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THE HISTORY OF THE DEVELOPMENT OF LAW.

AN INTRODUCTION TO

THE HISTORY OF THE DEVELOPMENT OF LAW

BY

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PREFACE

This volume is the outgrowth of some lectures delivered several years ago before the Post-Graduate Class of the University of Georgetown, and has been prepared in pursuance of a suggestion then made to the writer. The book is not a history of law, or a history of the development of law, which, in order to be adequate, would require a greatly more extensive treatment, but simply what it purports to be, an introduction to that subject; and it makes no pretensions to originality or novelty. It is believed, however, that it may be of some service, not only to the student of law, but also to the general practitioner and to the man of education and intelligence, who may desire a general idea of the subject, and yet may not have the time or the opportunity to investigate the sources of information. To those engaged in the work of legislation—and every American citizen is more or less engaged in that work—it may serve a useful purpose as showing how many of our efforts in the formulation of statutory law have been anticipated by past ages and nations that have long since gone out of existence.

For assistance in the preparation of the volume the writer desires to acknowledge his very great indebtedness to Messrs. Pollock and Maitland's History of English Law, and to Professor Guy Carleton Lee's admirable work on "Historical Jurisprudence."

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CHAPTER I

ORIGIN AND NATURE OF THE LAW, AND THE LAW OF NATURE

The history of law is the history of our race, and the embodiment of its experience. It is the most unerring monument of its wisdom and of its frequent want of wisdom. The best thought of a people is to be found in its legislation; its daily life is best mirrored in its usages and customs, which constitute the law of its ordinary transactions.

There never has existed, and it is entirely safe to say that there never will exist, on this planet any organization of human society, any tribe or nation however rude, any aggregation of men however savage, that has not been more or less controlled by some recognized form of law. Whether we accept the fashionable, but in this regard wholly unsupported and irrational theory of evolution that would develop civilization from barbarism, barbarism from savagery, and the existence of savage men from a simian ancestry, or whether we adopt the more reasonable theory, sustained by the uniform tenor of all history, that barbarism and savagery are merely lapses from a primordial civilization, we find man at all times

and under all circumstances, so far as we are informed by the records which he has left, living in society and regulating his conduct and transacting his affairs in subordination to some rules of law, more or less fixed, and recognized by him to be binding upon him, even though he has oftentimes been in rebellion against some of their provisions.

The recognition of the existence of law outside of himself, and yet binding upon him, is inherent in man's nature, and is a necessity of his being. And this is as much as to say that the very existence of human society is dependent upon law imposed by some superior power. While from our present standpoint the ultimate finite existence is that of the individual, and all true philosophy recognizes that society exists for the individual, and not the individual for society, yet it is also true that the individual is intended to exist in society, and that he must in many things subordinate his own will to that of society, and inasmuch as society can not exist without law, it is a necessary deduction of reason that the existence of law is coeval with that of the human race; and that the Creator of the human race is the fountain and source of all law, not only that which is designated as the divine law, but equally also all just human law. From the Creator alone all human law derives its sanction; without reference to the Creator there can be no justification for the existence of human law. For, without the sanction of the Creator and His authority for the ordination of

human society, man has no right to make laws for his fellow man, or for his posterity, since all men are equal in right, and all are ultimately responsible for their acts in the tribunal of conscience alone, which means merely before the tribunal of their Creator. Neither, therefore, upon the efficacy of any supposed social compact, such as has been vainly imagined by men like Jean Jacques Rousseau, who would eliminate the Creator from his own creation, nor upon the brute force of the majority to enforce its ordinances, does the existence of the social order depend. For, if the origin of law were to be sought in compact, a similar compact would suffice to abrogate it; and if it depended on the force of the majority, the wrongfulness of disobedience to its behests would depend entirely upon its discovery and manifestation to the world.

Suppose two shipwrecked men thrown upon a desert island, far removed from all human society, far removed from all its agencies and instrumentalities for the prevention and punishment of crime, and one in wantonness kills the other, is the act any less a crime, because it may never be discovered, because it may never be reached by the avenging arm of justice, because the social compact has never been in force in that remote region of the earth? Our conscience and our common sense rebel against the inference of any distinction between such a crime and that of the ordinary murderer within the pale of civilization.

But what is this law, of which we propose to trace the origin and the history? In the treatment of the development of law, it is certainly a necessary prerequisite that we should have some adequate idea of that with which we are to deal, and some knowledge of its scope and meaning.

There is much controversy, and indeed it may be said that there is almost hopeless confusion among the writers on elementary law in regard to the definition, origin and sanction of human law. Running through all their pages there seems to be a mortal apprehension of the acknowledgment of the existence of a Creator, of the Fatherhood of God and the Brotherhood of Man, of the sole and only conditions which make law intelligible; and there is constant and wearisome and meaningless recurrence to the theory of a social contract supposed to have been entered into by men in a state of nature and for which there is not the remotest justification in history, or in reason, or in common sense, and to the theory of the powers of society resting ultimately upon brute force, which can not by any possibility be a justification for anything. In one thing only do all writers on law now agree, and that is in the unqualified repudiation of Blackstone's famous definition of municipal law as unsound and wholly untenable. The great Commentator on English Law says that law is "A rule of conduct prescribed by the supreme power in the State, commanding that which is right and prohibiting that which is wrong." It is very justly ob-

jected that the latter part of this definition is either wrong or superfluous, and that the previous part is indefinite and unintelligible, besides being in many respects untrue. We know, for example, that custom and usage make law; and yet custom and usage are not prescribed by any supreme power in the State. To mention a common illustration within the experience of every man, we are all familiar with the direction upon country roads—"Keep to the right, as the law directs." There is usually no law that so directs except the law of custom. Usage, and not any supposed supreme power in the State has dictated the rule as a matter of convenience.

Again: what is the sense in this connection of the expression—"Commanding that which is right and prohibiting that which is wrong?" Have there not been statutory enactments which did the very reverse? Have there not been statutes which prohibited that which is right and commanded that which is wrong? It is easy for the student of English History, or the student of the history of Imperial Rome, to answer this question in the affirmative. And has there not been usage which sanctioned sacrifices to Moloch, and custom which justified murder? Then again, what connection is there between the fundamental principles of right and wrong, on the one side, and a revenue law imposing a tax upon bank checks, or levying a duty at the custom-house upon imported goods, on the other side? What principle of fundamental right is subserved by a statute which re-

quires the record of conveyances of real estate? There is a connection, it is true, in all such cases between right and custom, and between right and statute; but it is not the connection assumed by Blackstone.

Likewise, the question recurs,—What is this supreme power in the State, which has the prerogative of making law? Only with reference to England does Blackstone attempt to give an answer to it, and that answer is far from satisfactory. He says that it is the Parliament, composed of the King, Lords and the Commons; and the whole tenor of his work, as was pointed out long ago by his critics, Bentham and others, is to the effect that it was the King alone. For Blackstone was an advocate of the theory of the divine right of kings to rule independently of their people—an infamous doctrine which it is only necessary at this day to mention in order to insure its immediate repudiation, but which was in fact not only the theory, but the practice of the English Government in the days of Plantagenet, Tudor, and Stuart sovereigns, and down to that comparatively modern time, two centuries and a half ago, when Oliver Cromwell and his merciless horde of pious ruffians and shrewd fanatics shattered the theory forever on the bloody battlefields of Naseby and Marston Moor.

But while unanimously and most justly repudiating Blackstone's definition, with all that it implies, our modern writers on elementary law are hopelessly at sea when they attempt to define for themselves what municipal law

is, what is its scope, and what are its sanctions. And by the sanctions of law I here mean the grounds and the reasons upon which obedience is required to its enactments. The French publicists and some of the German writers, followed in this regard by various English and American authors, have, under the influence of atheistical theories eliminating God from his own creation, found the origin of law in a supposed contract entered into between the members of society to conduct themselves with propriety towards each other, an agreement which they designate as the Social Compact. As has been already intimated, the notorious Jean Jacques Rousseau is the author of the term, and is generally credited with being the first propounder of the theory. As a matter of fact, the theory is much older than Rousseau. The germs of it may be found in Plato, and in writers long before Plato. But wherever and with whomsoever it originated, it never had tenable foundation. The condition of society never existed, and can not even logically be assumed ever to have existed, which would have justified the assumption of such a theory. And yet it has found much favor with some American writers, who are fearful to find a common source for religion and politics, the Church and the State, which in their practical operation it was the aim of our governmental system as far as possible to keep distinct and separate, in one original mandate from God to man, and who therefore are reluctant to go back to Sinai or to Eden for the source of our municipal, as well as of

our religious law. And here let me say, in passing, that while Church and State are and ought to be separate in our country, it is not true, and it can never be true, that religion and politics can be wholly dissociated from each other.

Our American writers are generally content to say that municipal law is the expression of the will of the people, which means in practice the will of the majority; and that it derives all its efficacy from the right of the majority to govern. But it requires no very profound consideration of the subject to show that this begs the whole question and is simply a confession of ignorance; and that while in our system the right of the majority to govern, and therefore to make law, must within certain limitations be admitted, yet neither in the majority of the people, nor even in the whole of the people acting unanimously, if that were possible, is the fountain of law to be found.

For illustration of the subject—for here, perhaps, it may be best explained by illustration—let me suppose that a community has become so demoralized that it refuses to punish murder, or highway robbery, or arson, or rape, as a crime; would such refusal make the act less criminal? If the majority of a people, or their legislative agents duly authorized by them, infringed the inalienable rights of conscience and prohibited the quiet exercise of the religion which one honestly believes to be true, would the prohibition be right and just, merely be-

cause it was ordained by the people? If the majority of a people, or their legislative agents duly authorized by them, took the property of one person and arbitrarily transferred it to another, how would the transaction be made consistent with our sense of right and justice? But you will say that the people, or a majority of them, will do nothing so unjust. Why not? Have not peoples and nations, majorities and minorities alike, done what was wrong and unjust? And is not all history full of such injustice? That we now at this time in our own country may not deliberately do or authorize such wrong, may well be admitted; but what has that to do with the principle involved, if other nations and other ages have committed or may yet commit the wrong?

It is undoubtedly true that the immediate source of municipal law is to be found in the will of the people; and that the rule of the majority in some way or other, not necessarily always a numerical majority, is the only practical rule for the ordinary government of society and for the formulation of municipal law. But there is no guaranty of infallibility for majorities or for nations, notwithstanding that the theory of infallibility necessarily underlies all law. It can not be, of course, that what a people ordains to be law must of itself be right, and that what it prohibits must of itself be wrong. We know too well to the contrary. And yet it is true that it is the purpose of all municipal law to enforce the right and to prohibit the commission of wrong. Primarily,

however, right and wrong are independent of all municipal law and above it. Municipal law can not make that right which is intrinsically wrong; nor can it make that wrong which is intrinsically right, although for the furtherance of the general good it may prohibit that which, in the absence of prohibition, it would be right and proper to do.

The underlying principle of all just government and of all just municipal law is stated by St. Paul, when he says that "There is no power but of God" (Romans, xiii: 1). When we say, with reference to our republican institutions, and the right of nations to establish such institutions, that all power is from the people and in the people, we do not mean to contravene, but rather to emphasize, the doctrine of the great Apostle: for the full statement of the proposition is that all power is in the people from God. And this is no more than has already been intimated, that all the fundamental principles of law, not merely divine law, but human law also, are of divine origin, and are the dictate of the Almighty Himself; and that by Him it is committed to the people to organize society, according to their varying circumstances, to carry the fundamental principles into effect. Indeed, it would be entirely appropriate to say that all substantial law is divine, and that all just human law is merely regulation.

Let us illustrate the subject by reference to some special examples. Let us take the crime of murder. All

human law prohibits it, and all human law seeks with more or less earnestness to punish the commission of it with more or less varying penalties. What makes murder a crime? Assuredly not the statute which denounces a penalty for its Commission. Murder is a crime against the Law of Nature; and the statute merely recognizes the fact and provides the penalty, which has been left to society itself, that is, to the people to provide. And so we find that the penalty is often different, sometimes death, sometimes imprisonment for life or for a term of years, sometimes banishment, and sometimes other modes of punishment. Turn to civil matters. The right to hold property is a natural right; it is given by the law of nature, that is, by God Himself. It is not the creature of human law; and it is not within the domain of human law to prohibit or destroy the right of holding property. But human law may properly regulate it, and for the peace and good order of society it must regulate it. All human law on the subject is merely the regulation of the original, fundamental, God-given right, which antedates all human law.

This is not religious dogma or theological discussion in which we are indulging. Consider it as we may, analyse it as we may, endeavor to escape from it as we may, we are ever driven back upon the proposition that civil society is founded upon the Divine ordination, and that we can not eliminate God from the universe which He has created, least of all from the affairs of man, the crown

of creation. We may wilfully shut our eyes to the light, but the result is ever to convict ourselves of absurdity. We can find no sanction and no justification for any human law that would ignore the Law of God. Of course, I have no reference here to dogmas which are the subject of doctrinal controversy, but only to those commandments of the moral law which are regarded by all right-minded men as of universal application,—in other words, to the Law of Nature, as it is sometimes distinguished from the Law of Revelation.

Some writers object that the Law of Nature is an unsafe criterion for the basis of municipal law, because the Law of Nature, as they say, is indefinite, and is understood with differences by different nations, races, and peoples. But this objection overreaches itself; nor is it true in fact. There is no difference of opinion anywhere among the human race as to the criminality of murder, arson, robbery, stealing, adultery; nor is there anywhere controversy as to the right of private property. There is often difference of opinion as to minor details; and there is often looseness of action even in regard to fundamental principles. But the Law of Nature is no less specific and no less definite because there are criminals who violate its precepts. The Law of Nature has been distinctly recognized by the courts as being above all constitutions and all human ordinances. Only in the Law of Nature can there be found warrant for what are called the inalienable rights of man, and which are so called be-

cause they are above all human law (See Ex parte Virginia, 100 U. S. 368). Opinion of Mr. Justice Field.

All law, divine and human, civil and religious, municipal and ecclesiastical, starts from a common source. The different branches, it is true, deal with different spheres of human action; and they are not again to be blended, or to be administered by the same human authority. The Law of Nature, by which term we understand, as we have sought to explain, the original law imposed by the Creator upon man simultaneously with the commencement of human existence on this earth, has become, like the river which is stated in the Book of Genesis to have gone out from Eden to water the antediluvian earth, divided into four great branches, the Moral Law, Ecclesiastical Law, Municipal Law, and International Law; and of these four only the two latter are ordinarily assumed to enter within the domain of what we understand as Jurisprudence. But the Law of Nature remains the common parent of all of them.

The term "The Law of Nature" has often been misapplied to designate the conduct and the usages of rude savages living, as it is said, "in a state of nature." But this is a manifest abuse of the term. The savages in question live, not in a state of nature, but in a state of criminal degradation far removed from the condition which the God of Nature had intended for man. The true Law of Nature is God's law to created human nature, not the abuse of it which crime and degradation and lawless

passion have wrought in those who have sought to escape from its civilizing influence.

From this Law of Nature, from this Divine Law, as we may now properly call it, are derived all our rights and duties. In strictness, Human Law can not create either right or duty; its function is merely to regulate them. The freedom of the human will conferred by the Creator upon man is the sole source of all absolute human right, as the law which he gave at the same time is the source of all human duty. Secondary rights there are and secondary duties, which may be designated as the creation of human law; but even these spring from the divine ordination and the duty imposed upon man to respect the co-ordinate rights of his fellowman. It necessarily follows that all human law is only the compliment of the Divine Law, or Law of Nature, whichever we may call it; and the sole great purpose of the human law is to give effect to the Divine Law, to guaranty man in the exercise of his rights, and to require him to perform his duties. To conserve right and to enforce the performance of duty is the purpose of human law; and within this scope has rested the effort of all legislators at all times in the history of mankind. No system of human law has ever assumed to create a right; it has often enough assumed to restrict the natural rights of man; and no system has ever assumed to create a duty, except in the secondary sense to enforce pre-existing duty, or such duty as was assumed to be pre-existing.

The Law of Nature, as the source of all human law, has been regarded by various writers as too indefinite and too uncertain to form a satisfactory basis for the superstructure of what we may designate and what has been designated as Municipal Law. But this is because they have confounded the term in its proper sense with the sense in which it has been used by Rousseau and his followers. Of course, the rude usages of savages living in a state of degradation and infamy, is no proper criterion of the Law of Nature. As well might we seek for models of patriotism in the penitentiary as turn to the lawless savages to learn the elements of law. The Law of Nature is the law of civilization; and it is the mistake of these writers to whom I have referred to suppose that it is something obsolete, antiquated, peculiar only to some possible or impossible state of society that has long since ceased to exist, if indeed it ever existed. And it is in this mistake that all their difficulty arises. The Law of Nature is as much the law to-day as it was when the first human society was established upon the earth. It is the law of right and wrong, which does not change, because it can not change; and while we may differ about some of its details, no right-minded man will assert that there is any difference of rational opinion in regard to its fundamental principles. Reference has already been had to some of these. We may refer to them again. Murder, robbery, larceny, rape, arson, perjury, are recognized by all right-minded men to be intrinsically wrong, wheth-

er they are punished by human laws or not. No right-minded man will claim that their wrongfulness is the result of their prohibition by human law. They are wrong because they are prohibited by the Law of Nature, —that is, by the divine authority which ordained the existence of man as a social being, and left to society only the measure of the present punishment which it would mete out to them. And what is said of these salient offences against the divine ordinance is equally true of minor offences, however difficult it may be in some cases to determine where the divine ordinance ends and human provision begins.

A classification has been introduced into the discussion of Municipal Law by the use of the terms *Substantive* and *Adjective*. By the former is meant the body of the precepts of the law; by the latter the processes by which these precepts are carried into effect,—or, in other words, by which justice is administered. The classification, although in a somewhat altered sense is quite applicable to the Law of Nature and Human Law. The Law of Nature is the substantive collection of Divine precepts by which the rights and duties of man are all prescribed; the Human Law is the method adopted by society for the enforcement of these rights and duties.

But where are we to find this Law of Nature? I answer unhesitatingly in the Law of Revelation, in the spontaneous dictates of the human heart, in the fundamental principles of our Ayran Civilization. The prin-

ciples of right and wrong are inherent in our nature; and the Law of Revelation, which distinctly formulates these principles in positive precepts, only affirms and re-enacts the Law of Nature.

Let us illustrate. "Thou shalt not kill" is a precept of the Law of Nature; it is likewise one of the Ten Commandments of the Law of Revelation. It enters into the Code, moral and municipal, of every nation that exists in the world, or that has ever existed. The mode in which the precept is enforced differs in the different municipal systems, although the penalty of death is and always has been well nigh universal.

It is in the mode in which the great precepts of the Law of Nature, or the Moral Law, have been formulated by the different branches of the human race, and in the method whereby they are sought to be enforced, that the difference consists between the great municipal systems of the world. Some nations have been lax in their enforcement, and some have overloaded them with extraneous matter; but the great effort of all the nations has always been substantially the same. We can now pass to an examination of their methods in more or less detail.

CHAPTER II

THE MOSAIC LAW

First of all the municipal codes of the world in their importance to us, and relatively also the first in the embodiment of the Law of Nature in statute form, although by no means the first in the order of time, the so-called Mosaic Law demands our consideration.

Upwards of fifteen centuries before the Christian Era —the exact time has never yet been determined—a movement occurred, the greatest and most important in the annals of recorded time before the era of the promulgation of the Christian Religion. This was the Exodus of Israel from Egypt. You know the history from your Bible, and from the numerous text-books in the schools which give an account of it. It is in brief that the children of Israel, who had been domiciled in Egypt for 215 years and during the latter part of that period had been held in servitude there, suddenly went out from that country in a body, numbering probably about three hundred thousand persons, not three millions, as commonly stated, and withdrew into the deserts of Arabia Petraea, incidentally causing the destruction of the Egyptian

army in the Red Sea, and occasioning a commotion that was felt far and wide over all the shores of the Mediterranean. The leader of this movement was Moses, a man of extraordinary ability, versed in all the learning of his time,—one who had once stood in close relation to the Egyptian throne, and may have been regarded for a time as the heir apparent to the crown of the Egyptian monarchy. Subsequently an exile in Arabia on account of disturbances in the land of the Nile, he had ample opportunity during the many years of his sojourn in that country to consider the lessons of philosophy which he had learned from the Egyptian priesthood, to become familiar at the same time with the history and the traditions of his own people, and likewise to acquaint himself with the laws, the literature, and the history of Ancient Chaldaea. Setting aside for the time as foreign to our present purpose all consideration of the divine inspiration of the morality of the Bible, every intelligent reader of that sacred volume will readily recognize that the author of the first four of the five books of it which go under the name of Moses, and who was at the same time the leader of the great revolutionary movement commemorated in the Book of Exodus, must have been a man of wonderful intelligence and capacity, and eminently worthy to become the legislator of his people and the greatest legislator of all time.

The Mosaic Legislation, as it is called, was promulgated during the forty years for which it was ordained

that the people of Israel should lead a nomadic life in the wilderness of Arabia Petraea, before entering on a more settled condition in the Promised Land. It was committed to writing, as it is generally conceded, by the great legislator himself in the three books known by the names of Exodus, Leviticus and Numbers. The Book of Deuteronomy, which contains an elaboration and development of it would seem to have been a later work.

The Mosaic Legislation is claimed by its author to be based on the mandate of the Almighty Himself. "Thus saith the Lord God," is the formula with which he usually introduces his ordinances; and he begins it all with the Ten Commandments stated to have been given by God Himself amid the thunders of Sinai. These Ten Commandments are the primary and fundamental provisions of the Law; all the rest and residue of the Mosaic institutions are designed merely to carry these fundamental enactments into effect. These Commandments constitute what is known as the Law of Revelation; they give concrete form and expression to the Law of Nature. For now we can say that there is no substantial difference between the Law of Nature and the Law of Revelation. When we are asked what the former is, we can point to the latter. The Ten Commandments are well known to you. Every Christian youth learns them as the primary precepts of his religion; and every Christian youth is taught how they were delivered to Moses by the Almighty. They are the substance and the essence, the be-

ginning and the end of the Mosaic Law; and they are as binding to-day as when they were promulgated to the people of Israel in the valleys of the Sinaitic Peninsula. Since they are the Law of Nature, they have been binding since the world began; and inasmuch as they embody the Eternal Truth and are essential to the preservation of human society, they must continue to be binding until man and time shall be no more.

We are sometimes disposed to look upon the Ten Commandments as purely religious precepts, the expression merely of the moral law, and binding only upon our consciences. This is an exceedingly grave mistake. It is a mistake natural to be made by those who would ignore God in temporal matters; and perhaps equally natural with those of purer thought and better meaning, whose solicitude it is to keep religion and political economy, the spiritual and the temporal, as far apart as possible in their administration. Fully appreciating that in our governmental system these two should not be confounded, and that the human conscience should be left as free as the Creator has left it and has intended it to be, yet we are compelled by the logic of reason to hold that they can not be absolutely divorced from each other, since both human law and religious law alike spring from the same source and are equally founded upon the Ten Commandments, and it is the purpose of both equally to carry these commandments into effect. In fact, only two of the Ten Commandments are of a purely spiritual or religious

character; that is, deal exclusively with the direct relations of man to his Creator. One is as much of temporal as of religious importance. The others may be said to deal almost exclusively with the organization of human society,—that is, with temporal affairs; and from the standpoint of our present subject we may say that only in a secondary sense have they a religious import. Recall them for a moment, and you will readily perceive that the Ten Commandments, although sometimes spoken of as the Moral Law, binding only upon our consciences, are the basis of all that we call our Municipal Law.

Omitting consideration of the preliminary commandments, which inculcate the doctrine of the Unity of God, Creator and Ruler of the Universe, and which prohibit idolatry, although even these enter more than we think into the substance of our temporal legislation, we find that the observance of a periodical day of rest and religious worship is enforced by the municipal law, and that in the spirit of the Commandment even additional days of rest and religious observance are promulgated by the temporal authority for the relief and the welfare of overworked humanity. In this connection it might be well to recall the fact, that, when in their blind, fanatical onslaught on all existing usages of society, the French Revolutionists of 1793, sought to abolish the institution of the Sabbath, and yet were compelled by the underlying principle of the divine ordinance and of the human necessity dependent upon it to appoint each tenth day as a

day of rest, the scheme would not work. Human nature rebelled; and the seventh day of the week was soon restored to subserve the great purpose.

Three of the Ten Commandments establish the foundation for all the provisions of the Municipal Law in respect of the domestic relations; one enunciates the doctrine of the sacredness of human life—and human law regarding homicide adds no more to it than to supply the penalty for its violation. In two, the law of private property is epitomized; and the administration of justice rests upon the precept—"Thou shalt not bear false witness against thy neighbor."

The Moral Law, as such, may perhaps be admitted to be binding only upon the conscience; but all human law must begin with the Moral Law, and can only reannounce its principles and build upon them the superstructure necessary for the conservation and good order of society.

Starting with the embodiment of the Moral Law in the Ten Commandments as a foundation, the Legislator of Israel constructed an elaborate and extensive legal system. Besides the establishment of a system of minutely regulated religious observance and of a simple yet extensive sacerdotal organization, with which here we have little or nothing to do, Moses defined the domestic relations and formulated laws for the government of property and for the administration of justice on lines not very different from those which obtain in our own

modern jurisprudence. Indeed, so nearly was the regulation of the domestic relations analogous to our own that we may rather consider some matters of difference than the features in which they agree.

Divorce, which under the Christian dispensation was religiously and rigorously prohibited for upwards of a thousand years, and which is yet the social feature of our human organization upon which the Christian Church most uncompromisingly insists, was freely, rather too freely, allowed in the Mosaic system. In this regard the Mosaic system was not greatly in advance of that of Egypt and Babylonia; although it sought to give greater protection to the wife. The liberal allowance of divorce was a characteristic feature of all the ancient systems of jurisprudence; although, to its credit, it was wholly unknown in ancient Rome for upwards of five hundred years. It was not, however, as prevalent in Israel as it was elsewhere, in consequence of the comparatively liberal provisions of the Mosaic Law for the benefit of the wife.

Polygamy, too, was not unknown in Israel. With reference to it the Mosaic Jurisprudence is strangely silent. But that it prevailed to a considerable extent and that it was not prohibited by the law, we know too well from the history of the Kings of Judah and Israel.

It was in the matter of the allowance of divorce and the toleration of polygamy that the shortcomings of the Mosaic Law were most sharply criticised by the divine

Founder of the New Dispensation, who distinctly told the Jews of His own time that these things had been allowed to them and to their ancestors on account of their hardness of heart, and who thereupon ordained that the relation of husband and wife should be strictly monogamous and the bond of matrimony forever indissoluble. To the credit of the European or Western Aryans, those of Greece, Rome, Germany, and the Celtic nations, it must be said that, though they did not always live up to their tenets, the principle of monogamy, and to some extent that of the indissolubility of the matrimonial union always obtained, in sharp contradistinction to both the tenets and the practices of the Semitic and Hamite nations as well as the Eastern Aryans, who probably became corrupted in this regard by their close contact with Semitism.

In this same connection, it may be noted as a peculiar fact that in our modern age, notwithstanding the experience of nearly two thousand years of Christian inflexibility, nearly all the nations of the world, while yet claiming to be Christian, have repudiated the essential Christian dogma of the indissolubility of marriage and have fully re-introduced the pagan theory of divorce. They have gone far beyond the freedom allowed by the Mosaic Law, and have even multiplied the causes of divorce to an extent unknown to the Hebrew legislator. It may be well to inquire sometimes whether this license in respect of the domestic relations is not the fruitful pa-

rent of the spirit of Anarchism with which the stability of human institutions is now threatened.

The institution of slavery existed in Israel, and was recognized and regulated by the Mosaic Law; and its horrors were thereby greatly mitigated. Cruel treatment of slaves was prohibited under severe penalties; and in the case of an Israelite the condition itself could not last beyond seven years. For it was commanded by Moses that in each seventh year, known as the Sabbatical year, the slaves of the Israelite race, who were generally such either for crime or for debt, should be manumitted.

So much for the law of the domestic relations as regulated by Moses.

The laws of inheritance, as established by him, were simple enough, yet remarkably comprehensive. It was provided that real estate should descend to all male children equally, except that the eldest should have a double portion; that, in the absence of male children, it should go to the females equally; that, in the absence of any children of the deceased, it should go to his brethren equally; and then in succession to the brethren of the father, and then to the next of kin of the family. How these next of kin were to be ascertained, we are not told; but, as there was not any trouble in Israel upon this point, so far as we are informed, it may be presumed that the degrees of relationship were well understood and well-established among them. A singular provision, connected with their well-known tribal organization, was

that the inheritance was always to be retained in the tribe. And for this reason women who owned property were not allowed to marry out of the tribe to which they belonged. The freedom of the men was not similarly restricted; there was no necessity for such restriction.

The tribal organization of Israel, it may be noted, was a peculiar institution. It did not originate with Moses; it had its source in the twelve sons of the Patriarch Jacob, the progenitor of the race. But Moses recognized it in his legislation, and evidently sought to perpetuate it. It seems to have been the foundation of the scheme of local self-government, which, with true republican instinct, he sought to establish, while at the same time providing for the nationality of their religion as a centralizing bond of unity and for some kind of central authority. The institutions of Moses were thoroughly republican; the tribal organization was the corner stone of the structure. The twelve tribes were twelve confederated States leagued together in a common union. And it is to be noted that, when the people insanely abandoned their republican freedom and clamored for a king to lead them like the neighboring nations, the tribal organization speedily vanished. The kings had no use for the tribal organization.

During the greater part of the period of their national existence, the Israelites were a simple agricultural people, and devoted themselves but rarely to the pursuits of commerce, which in modern times have almost exclu-

sively occupied their attention. It is true that during the republican period two of their tribes, those of Asher and Dan, whose possessions adjoined the seashore and were contiguous to the great trading cities of Tyre and Sidon, seem to have betaken themselves largely to navigation, probably in connection with the Phœnicians (Judges v: 17); and that Solomon and some few of his successors fitted out vessels on the Red Sea to trade with the distant regions of Tarshish and Ophir (1 Kings ix: 26-28). But this commercial activity was exceptional. The Israelites in general remained an agricultural people until the latest day of their national existence. For this reason, and because it was probably so intended by Moses, inasmuch as the tendency of commerce is to substitute Mammon for Jehovah, there is no great space devoted to personal property or to the matter of contracts in the Mosaic legislation. It may be that this was regulated by the several tribes for themselves.

There is one conspicuous feature, however, in the Law of Moses respecting contracts which has always received specific notice; and this was the absolute prohibition of all usury, which in this connection means not excessive interest, but any interest whatever, from a brother Israelite for a loan of money. Such usury or interest was allowed to be taken from an alien. The penalty for a violation of the law would seem to have been merely a forfeiture of the interest, with the right, however, to recover the principal. Strangely enough, the spirit of

modern legislation, after upwards of two centuries of legal enactment which sought wholly to invalidate all usurious contracts and to forfeit both principal and interest, is tending towards the re-establishment of the rule of the Mosaic Law.

In the Criminal Code of Israel murder, kidnapping, rape, adultery, blasphemy, and certain unnatural acts of lust, were declared to be capital offenses punishable with death; assault and battery were punished with a pecuniary forfeiture, or with retribution in kind, such as an eye for an eye, a tooth for a tooth, and the like; and both highway robbery and larceny had the penalty attached of compulsory restitution, two, four, or five fold the value of the property taken, according to circumstances. In case of inability to pay a fine or to make restitution, the culprit was sold into slavery. For other offenses a large latitude was left to the judges to deal with them according to the circumstances of each case. The death penalty was usually inflicted either by hanging or stoning.

One provision there was in the Mosaic Code which deserves our most profound respect. It was positively and repeatedly enjoined that there should be but one law alike for Israelite and alien, and that the stranger should be kindly treated. This probably did not include the matter of usury to which reference has been made. To the credit of Israel it should be said that in all their annals there is no instance of a violation of this injunction. There was a similar rule in the Athenian Code of Solon; and Rome

to some extent during the period of her greatness sought to act upon the same principle. But in other systems both of the ancient and the modern world, and not least of all in the so-called common law of England, there has been too often unjust discrimination against the alien and the stranger.

A noteworthy provision of the Mosaic Code was that in a capital case no one should be convicted on less than the testimony of two witnesses (Numbers, xxxv: 30), a provision which seems to have been afterwards extended to other cases not necessarily capital (Deuteronomy, xix: 15). This appears to have been almost peculiar to the Mosaic Law. It contrasts most favorably with the system which, in England, during the days of the Tudors, Stuarts, and first Hanoverians, allowed convictions for alleged crime, especially treason, to be had on the testimony of one witness, and that witness too often a perjured villian utterly unworthy of belief,—a state of things which led to a partial remedy of the practice in our Federal Constitution, wherein it was ordained that no person should be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. In our law this is only a return to the just and equitable rule of the Mosaic Code.

We are not informed by the Mosaic records or the annals of Israel what machinery, if any, the great legislator provided for the administration of justice. This would seem to have been left in great measure to be determined

by the several tribes for themselves. There would seem to have been local courts in each city constituted of the elders (Numbers, xi: 16); but how these elders were chosen does not appear. It is probable that it was only in the latter part of the Israelite history, after the return of the Israelites from their Babylonian Captivity, and probably even after the inception of the Seleucid domination, that the great central council or high court of the Sanhedrim, composed of seventy persons, was established for the trial of the more important cases, and probably also as an appellate tribunal to supervise the judgments of the lower courts. Much is heard of this tribunal in the days of Christ and the Apostles and during the desperate contest with Rome which supervened soon thereafter; but there is no mention of it or of any similar tribunal in the early days.

It is a peculiar fact, however, that in the time immediately following that of Moses and Joshua, that is, during the time of what we call the Commonwealth of Israel, several distinguished persons arose, who are distinctively designated as Judges of Israel. Their number is usually given as twelve; they were in fact fifteen, for it is quite evident that we must include Samson, Eli, and Samuel among them. These illustrious persons are stated, after first delivering Israel from the external enemies who then beset and oppressed the country, to have thereafter *judged* the people, for a term of years, apparently meaning for the remainder of their lives. The so-called Book

of Judges, the seventh in numerical order of those included in the Sacred Compilation, is devoted to an exceedingly condensed account of the military exploits of these personages. The peculiarity is that they are so uniformly and persistently designated as *Judges*. The last of them, the illustrious Samuel, we know held court; a circuit court even it may be called, for it was apparently held at different places in the Commonwealth (1 Samuel vii: 15, 16, 17; 1 Samuel, viii: 2). And it is remarked that his sons, who acted in his place in the southern part of the country, were corrupt in their office and accepted bribes to influence their administration of justice. And this bribery and corruption it was which in connection with a sudden attack of the Ammonites gave the immediate occasion for the demand for a king. The corruption of the judiciary is not consistent with the permanency of republican institutions.

It is probable that these so-called Judges of Israel were primarily military leaders, or perhaps what we would call executive officers, presidents of the Commonwealth of Israel, accepted as such by the popular acclamation; and that thereafter, by virtue of the eminence which they had obtained, they became judges of *the* people. In the ancient monarchies of the world there was little or no legislation, such as we have in these modern days, and there was no legislative body. The duty of the monarch as ruler was in war to lead the armies of his country, and in peace to act as Judge for his people.

The republican leaders of Israel had no different purpose to subserve. It is not inappropriate, therefore, that they should have been designated by the name of Judges.

The Mosaic Law, as already stated, was intended for a simple people, agricultural and pastoral in their habits—a small republican people, comprising twelve tribes or States united in one Federal Union. It did not segregate the subject of religion from the temporal authority; there was no need to separate them in that day. It was a Code of Law addressed to a free people. It was evidently no more than a general code of general application, which left to the several tribes much to be determined for themselves as to the manner of its enforcement. Of this there is evidence all through the sacred writings, and especially in the famous Canticle or Battle Hymn of Deborah, the heroic woman who holds the fourth place in the order of time and the first in honor and fame among the Judges of Israel. For in that hymn she refers to the discordant counsels of the several tribes with regard to the great and successful war which she undertook against the confederated peoples of North Canaan under King Jabin of Hazor, and in which she so signally defeated the enemies of Israel (Judges, Chap. V). But we have now no means of determining how Israel administered the Code of Law left to it by its great legislator. It is, however, undoubted that, while the people often fell away from the observance of the law and neglected its precepts, they cherished the Law in theory

as the distinctive heritage of their race, and became more attached to it as their national independence declined.

When the free Commonwealth established by Moses and Joshua, and whose annals had been illumined by the glory of Deborah and Samuel, gave place to the monarchy of Saul and David and Solomon, and especially when that monarchy became subdivided into the two petty kingdoms of Judah and Israel, the Mosaic Law lost much of its vitality, although never its authoritative force. It is a significant fact that it is stated in the Second Book of Kings (xxii. 8), that in the time of King Josiah, who reigned B. C. 640-608, and who was one of the very few kings who are designated as virtuous, the High Priest Hilkiah, according to the words of the sacred penman, "found the book of the law in the house of the Lord"; and that the good king, when he heard the book read, rent his garments for the failure of his people to obey the law. The necessary implication is that the discovery was regarded as something extraordinary, that the Mosaic Code had not been in great demand in the times immediately preceding, and that there was but little law and much lawlessness during the period of the Kings,—a fact, however, which is known to us from the chronicles of the monarchy. King Josiah came five hundred years after Samuel, and one thousand years after Moses; and it required many a prophet and many an ardent disciple of the Law to keep its tenets alive during the period of degeneracy.

The Mosaic Law, however, survived the worthless and profligate monarchy; and when upon the liberation of the Israelites from their Babylonian captivity by Cyrus the Persian, and their return to the land of their fathers, a republican form of government was again established under the mild suzerainty of the Persian Empire, the Mosaic Law was restored into effective operation and to something of its pristine purity by Ezra, a man of the levitical order, who had attained high office under the Persian monarch, Artaxerxes Longimanus, about 450 B. C., and who had been sent by that monarch to establish order and good government among his people. Ezra, as we are told in the first two Biblical books which go by his name, was well versed in the law, and therefore competent to revise and annotate the work of Moses. Under altered conditions it was found necessary to make some minor changes and modifications in it; and the result was its republication, as revised, in the book known as Deuteronomy,—a term which in Greek means *the second law.* The Book of Deuteronomy is usually included in what is known as the Pentateuch, or Five Books of Moses; but it is now the very generally accepted theory that, at least in its present form, it is the production of Ezra. The revision did not greatly or in any essential feature modify the original legislation; but it had the effect of causing a remarkable revival of legal study and occasioning the establishment of a school of lawyers or doctors of the law, frequently referred to in the New Testament by the

name of Scribes, the very name by which Ezra described himself. The Scribes, as we know, in their fanatical zeal for the Mosaic Institutions, sharply antagonized the teachings of our Saviour, and combined with the hypocritical Pharisees to become his deadliest enemies.

In the period of about five hundred years which elapsed between the revival of the Mosaic Law by Ezra and the destruction of Jerusalem by the Romans in A. D. 70, the study of that law was exceedingly active among the Israelites. This activity had been intensified by the bitter hostility manifested by the Greco-Syrian Seleucidæ to the Israelites and their religion, and by the attempts of the surrounding nations to destroy their national existence. More than ever at this time did the Israelites feel that their integrity as a people and their national independence were indissolubly linked to a rigid adherence on their part to the law of their fathers, the Mosaic Law. But both the national independence and the supremacy of the Mosaic Law perished when the invincible legions of Rome under Titus, in A. D. 70, captured and destroyed Jerusalem and overthrew the Israelite Commonwealth,—not, however, until there had gone forth from Israel a new Law and a new Dispensation, firmly based upon the old and intended to fulfill the promise of the Mosaic Institutions. This New Dispensation was destined to leaven and to rule the world. While many of the details of the Old Law fell into disuse or were abandoned as incompatible with the new ideals of life

that were set up by Christianity, the substance and the essentials of the Mosaic Law remained; and the institutions, which had previously been confined to the narrow strip of land constituting ancient Palestine, now under the influence of a broader scheme of human life, overleaped their former narrow bounds and made themselves felt throughout all the world.

The Mosaic Dispensation marked an epoch in the history of legislation equally as in the history of religion; and it is more apparent to us to-day than it ever was before that it had great influence over the ancient world, as well as upon the modern. It may be said, however, that neither in the domain of legislation nor in that of religion did it receive its full development, until, in the propagation and triumph of Christianity, it claimed the world for its sphere of influence. It is remarkable that a recurrence to it as a living law of human conduct was sought by the Puritan Commonwealth of Oliver Cromwell in England, and in the Puritan Commonwealth of Massachusetts on our own continent, both of which, in their fanaticism, made the mistake of supposing that the rigidity of the Mosaic Institutions was not incompatible with the altered conditions of modern society and the spirit of true freedom inculcated by Jesus of Nazareth.

It is a curious fact that not till long after Israel had ceased to be an independent nation, and long after the Mosaic Law had ceased to have binding force except upon the consciences of those who still adhered to the ancient

religion of Israel, was the great commentary upon it written which bears the name of the Talmud.

A wonderful work of patient ingenuity, logical reasoning, and acute casuistry is the Talmud; although it is replete with almost puerile absurdities and grotesque and often obscene fancies, and with much that we, from our standpoint, would regard as blasphemy. It is a work that is often referred to and rarely read. But with all its incongruity it must be regarded as a most remarkable commentary on the Mosaic Law. There are two editions of it, or rather two compilations that go under the name,—the one known as the Talmud of Jerusalem, and the other as that of Babylon. Strangely enough, both names are misnomers; for the Talmud of Jerusalem was not composed in Jerusalem, and had no connection with the Holy City, but was the work of a celebrated school of doctors of law or rabbis established in Galilee or northern Palestine; and the so-called Babylonian Talmud was not Babylonian at all, for Babylon was in ruins at the time at which it was compiled, but was the composition of a similar school of rabbis located in Northern Mesopotamia. Both compilations profess to be in the main a digest of the opinions of celebrated doctors of the law; and therefore are characterized by a substantial uniformity. Both were composed in the period beginning with the second and ending with the sixth century of our era, during which the two great schools mentioned were in their most flourishing condition. Some of the doctors,

however, whose opinions are cited lived before the Christian Era; and a consecutive succession of them is claimed to have extended from Antigonus of Socho, about 200 B. C., to Rabbi Juda, about 200 A. D., and to have included in their number the famous Hillel, surnamed the Great, Gamaliel, the preceptor of St. Paul, and Akiba, the adviser of the false Messiah Barchochebas, who led the desperate rebellion of the Jews against the Roman Empire in the reign of Hadrian, A. D. 132.

The Talmud is composed of two parts, the Mishna and the Gemara; the former a treatise on the whole Mosaic Law, with numerous illustrations showing the application of the text to particular cases; the latter, a series of philosophical discussions of certain portions of the Mishna. There are numerous divisions and subdivisions of subjects, the treatment of which is in the main acute, subtle, and highly philosophical, although as already indicated not infrequently puerile and absurd. It is the monumental work of Israelite literature, and undoubtedly exercised a great influence both on the subsequent Mohammedan literature and on the scholastic philosophy of the Middle Ages. Of course, it does not discriminate between the legal and the religious features of the Mosaic Law. To the Jews of the time and of all times the Law, the Mosaic Law, was one and indivisible. They did not segregate the temporal ordinances, intended merely to give effect to the great precepts of the Law of Nature, from the original great Law itself; and it is probably due

to this fact more than to the character of the Mosaic legislation itself that the whole of this legislation has come to be regarded as theocratic.

An analysis of the Talmud would be interesting to the antiquarian and the scholar; but in a course like the present any extended consideration of it would serve no good purpose. It is sufficient to have called attention to it as one of the most remarkable commentaries on one of the most remarkable codes of law that have ever been promulgated, and yet as a work which is of no practical use whatever to the lawyer and the statesman in the application of the principles of Jurisprudence.

The Mosaic Law can never cease to have importance for us. Its great principles are at the base of our own law to-day. Its morality is in the main our own morality, sublimated and enlarged by the nobler dispensation of the Divine Founder of Christianity. It is a curious fact that the Puritans, who did not stand alone in this regard, both those who followed in England the banner of Oliver Cromwell, and those who sought greater freedom for themselves in America, were strongly disposed to restore the Mosaic ordinances in all their entirety, as well as in all their rigor, and succeeded for a time in doing so to a limited extent. Of course, this attempted revival of the Mosaic Law under the altered conditions of humanity could not last. It was a mistake not to distinguish between the transitory and the permanent features of that Law. The former were destined to pass away

with the nationality of the people for whom alone they were intended; the latter have become a permanent part and an essential feature of our municipal system of legislation. It is safe to say that, looking at the matter from the merely human standpoint and regarding Moses as being the author of the Code of Law which bears his name, he has more largely influenced the human race than any other lawgiver that has ever existed.

CHAPTER III

DEVELOPMENT OF LAW IN BABYLONIA, PHOENICIA, AND EGYPT

1. Babylonia.

Moses, if the greatest, was not the first of ancient lawgivers in the order of time. There were highly civilized communities long before his time; and a highly civilized community without an adequate system of law is as much an impossibility as would be a well-disciplined army without a leader. For about a thousand years, or upwards, before the Hebrew Chief led the Exodus of Israel from Egypt, there had existed on the lower Euphrates, in the region bordering on the Persian Gulf, or Gulf of Oman, as we sometimes call it, a people so far advanced in the arts of civilization that the evidences of that civilization found in the *debris* of their buried cities through all the length and breadth of the Mesopotamian Plain even now excite the wonder of the world. These were the Babylonians.

The great Mesopotamian Plain, as it is called, extending from the mountains of Armenia on the north, or rather northwest, to the Persian Gulf on the southeast,

comprising Mesopotamia Proper, Assyria, and Babylonia, so far as tradition and recorded history alike inform us, was the earliest seat of human existence and of human civilization on the globe. Babel, and Erech, and Accad, and Calneh, in the land of Shinar, earliest and most ancient of human cities, formed a great quadrilateral, which constituted the beginning of the monarchy of Nimrod, the mighty hunter, and of which the first mentioned, Babel, was the nucleus of the subsequent great city of Babylon, and generally the capital of the region of Babylonia or Chaldea. Another quadrilateral of cities farther north, comprised of Nineveh, Rehoboth, Calah, and Resen, constituted the foundation of the Empire of Asshur or Assyria, sometimes the rival, sometimes the conqueror, always the antagonist of the Southern Monarchy, but occasionally combined with it under one great sovereignty. The Assyrian Empire seems to have been generally of a more military character than the Babylonian Monarchy, and therefore less civilized. In the cities of the south, Babylon, Accad, Sippara, and others, whose very names have now perished, was developed the first great civilization of the world, by the enterprising race known to us as that of Cush, which overspread all the shores of the Persian Gulf and Indian Ocean, and produced the first navigators and the first merchants of the world, and therefore necessarily the first code of law; for it is to the demands of mercantile life that legislation primarily responds.

For more than two thousand years, Babylon, the great city on the Euphrates, the city of Nimrod, and Semiramis, and Nabonassar, and Nebuchadnezzar, was the seat of the greatest civilization and the center of art and science in the world, pre-eminent for its culture, and famous for its learning. If you will look at that clock on the wall, you will see a most realistic memorial of ancient Babylon—not that ancient Babylon invented clocks or watches, although it did invent the sun-dial, the progenitor of both—but that the division of time indicated by that clock, possibly even the notation on the face of it, was invented by the Babylonians, ages before Romulus founded the City of the Seven Hills on the banks of the Tiber. The division of the hour into sixty minutes, and of the minute into sixty seconds, and of the day into twenty-four hours, is of Babylonian origin, as is the division of the circle into three hundred and sixty degrees. Astronomy and mathematics had their origin, and for many ages their chosen home, in Babylon. Indeed, it would be difficult to say what science or what art did not have its origin in Babylon. To its latest day Babylon remained the University City of the world.

Babylon, and the Civilization of Babylonia, except in so far as it had been absorbed by the outside world, perished under the destruction and ruin wrought by successive conquerors from Darius Hystaspes to the fanatical caliphs of Islam; and only within the last seventy years have we begun to dig up the evidences of that civilization

from beneath the soil which has covered them for twenty centuries and upwards. These evidences, fragmentary as they are, and probably must always remain, are such as to astonish the world. We learn conclusively from them that the story of ancient Babylon, as told by Herodotus, Ctesias, and other ancient chroniclers, the story of its great walls, its strong towers, its magnificent palaces, its vast extent, its remarkable canal system, long supposed to have been grossly exaggerated, has actually fallen short of the truth. Clay tablets have been found that remarkably corroborate the story of Genesis; and letters have been unearthed, engraved upon similar tablets, which passed between the Kings of the Euphrates and the Kings of the Nile more than three thousand years ago, probably before Moses crossed the Red Sea.

What is more to our point at present, tablets have been uncovered to the light of day that tell of the usages and customs and daily life of the Babylonians, and give us a fair idea of their legislation and judicial procedure. They tell of contracts, purchase and sale of real estate, leases, mortgages, bailments, interest, banking, partnership, the domestic relations, marine insurance, wills, and inheritance,—in fact, of all the subjects ordinarily dealt with by modern municipal law; and they indicate the existence of a legal system in Babylonia not at all unlike those to which we are at the present day accustomed.

A remarkable peculiarity of Babylonian law, which these tablets disclose, concerns the domestic relations.

They show the substantial autonomy of married women. Although, by entry into the matrimonial state, a woman became legally subject to her husband, yet she retained the control of her own property, and could dispose of it as she pleased, by will or deed; and she could even become a creditor of her husband. It would seem that even our own latest Married Woman's Act is no very great advance on the legislation of ancient Babylonia.

Polygamy and divorce were both allowed; the former would seem to have been rare, the latter frequent enough. But divorce was not allowed without specific provision for the divorced wife.

The Babylonian laws of inheritance provided for equal division of estates among children, with some increase, however, in the share of the oldest son. Widows generally became administrators and guardians of their children. Advancements were sometimes made by parents to their children, as with us. Devises of real estate by will were known in the later Babylonian law, although apparently not in the early stages of the system.

Numerous transcripts of contracts have been found, which seem to have been generally executed in duplicate, before witnesses, or a public officer corresponding to the modern notary, and signed by the parties. Contracts of rent were generally for a year; instances of larger leases, however, have been found, and it would seem to have been usual to pay part of the rent in advance. In contracts of lease it was usual to insert numer-

ous conditions and covenants. There were contracts of mortgage, with right of redemption and foreclosure. Land was conveyed by deed, wherein the metes and bounds were described; and if any part of the purchase money was postponed, as seems not to have been unusual, the terms of payment were prescribed in the deed. Deeds have been found that reserved a right of reversion of the estate to the grantor or his heirs. On one of the tablets which have been discovered there is the record of a suit for the recovery of real estate somewhat analogous to our action of ejectment.

The judges, to whom the adjudication of legal controversies was referred, seem to have been generally taken from the priesthood. Oaths and attestations were used in legal proceedings; and in some cases, as in the suit of ejectment which has been mentioned, there were witnesses, who seem to have discharged functions similar to those of juries under our Common Law.

It is apparent that there is a remarkable similarity between the ancient Babylonian Code and our most advanced modern systems of law; and that the progressive and enterprising Cushite communities of the Euphrates could not have learned much from our modern legislation. It is greatly to be regretted that we do not know all their law more fully and in greater detail.

A curious fact is that thus far most of the traces of the ancient Babylonian Law have been found, not in Babylonia itself, but in the ruins of the more northern

cities of Assyria. The most extensive and the most valuable discovery has been in the palace of Asshur-bani-pal, the Assyrian monarch who is better known to history by the name of Sardanapalus, not the effeminate prince who perished in the ruins of Nineveh, when that famous city fell before the conquering hosts of the Medes under Cyaxares, but his immediate predecessor, sometimes called by way of distinction from the other, Sardanapalus the Warrior. Asshur-bani-pal, or Sardanapalus the Warrior, whichever we call him, was not only a famous warrior, but also a kind of Justinian or Napoleon in the domain of Jurisprudence. He caused a translation to be made of all the laws of Babylonia from the ancient Sumerian language of the city of Accad into the Assyrian vernacular, and stored the tablets in a room of his palace evidently intended for a library. He was the ruler both of Assyria and Babylonia. But his action did not mark the first adoption of the Babylonian law by the Assyrians; that adoption, in whole or in part, was of much earlier date. In fact, the laws of Babylonia would seem to have afforded a model for all the nations of Southwestern Asia, and most of all for their cognate race, the Phœnicians of Tyre and Sidon.

2. Phœnicia.

It is most extraordinary that the ancient people, who by their language, their laws, their literature, their arts and sciences, and their great deeds, influenced their own

and all subsequent ages more than any other one nation that ever existed, the world-famed Phœnicians, should be at the same time so well and so little known to us, and that their history and their institutions, of which we read on almost every page of ancient story, yet are a blank to us. The Phœnicians were the great merchants of antiquity, in fact the greatest mercantile people of all time; the most enterprising race of explorers and navigators the world has ever known, not excepting even our own restless Anglo-Saxon race; the people from whom Greece and Rome derived the letters of their alphabet and the greater part of their civilization; and from whom through Greece and Rome, our own civilization has been derived; a people who sailed along all the shores of the Mediterranean and the Indian Ocean a thousand years and more before the Christian Era, who circumnavigated Africa ages before Vasco de Gama accomplished that great enterprise, who explored the Atlantic coasts of Europe from Cadiz to Iceland and Norway long before the foundations of ancient Rome were laid, and who, as it has with great plausibility been asserted, may have crossed the Atlantic Ocean itself more than two thousand years before Columbus achieved the daring deed, and who may have opened communication with the Mound-Builders of the Mississippi and Ohio valleys, if indeed they were not themselves the Mound-Builders, as by some writers has been asserted and argued.

Not only upon the sea, but inland also, the Phœnicians

established their trade. They controlled the commerce by caravan through Central Asia. In Central Europe they established communication from the Black and the Adriatic seas across the continent to the Baltic. They worked the gold mines of Ophir in Southern Africa, the silver mines of Spain, and the tin mines of Cornwall in England; and they traded with the Baltic for amber, and with the islands of the Indo-Chinese seas for the spices and perfumes and other rarities for which they were then as now renowned. And not only were they the great merchants of the world; they were likewise its most noted artisans. They furnished architects and builders to King Solomon for his great temple; and many of the gigantic structures reared by the monarchs of Asshur were the work of their hands. They discovered the mode of manufacturing glass, and likewise the famous Tyrian dye; and they seem to have had the mariner's compass to aid them in their navigation. Above all, and greatest of all their contributions to human civilization, they either invented, or introduced to the world what possibly may have been the invention of others, the original letters of our Graeco-Roman Alphabet, our own letters of to-day with but slight modification—an invention of which we daily and hourly enjoy the benefit, and without which the remainder of our civilization would be comparatively valueless.

But it would require many pages to narrate the achievements of the Phœnicians, whose fame in the an-

cient world was in inverse proportion to the size of the country, a narrow little strip of land along the eastern shores of the Mediterranean Sea, from 100 to 150 miles in length, and from about 5 to 20 miles in width, lying between the sea and the mountains of Lebanon. And yet, strangely enough, we know exceedingly little of their history, and almost nothing of their laws and social institutions. They adjoined the territory of the Israelites and probably borrowed from the latter their republican institutions, which they transmitted to their numerous colonies; for a great many colonies they planted, in which to some extent they continued their national existence, among them, Crete, Rhodes, Boeotian Thebes in Greece, Carthage and Utica in Africa, Tartessus, Cadiz, and Lisbon in Spain and Portugal, and several on the shores of the Black Sea. Tyre, and Sidon, and Aradus, the principal cities of the parent country, by their great wealth, attracted the cupidity of the monarchs of Egypt, Asshur, and Babylonia; and they suffered much in frequent wars, and were several times besieged and captured. Sidon at last was destroyed by Artaxerxes Ochus, King of Persia, in B. C. 351; and nineteen years later, in B. C. 332, Tyre suffered a similar fate at the hands of the famous conquerer, Alexander of Macedon. Carthage, the greatest and most renowned of all the Phœnician colonies, was utterly destroyed by the Romans, so that not one stone was left upon another; and, except in so far as its people came into contact or collision with the Romans, or with

the Greek cities of Sicily, its history has absolutely perished.

We are, therefore, without any record whatever of Phœnician law, which necessarily must have been the most advanced code of law of the ancient world, inasmuch as their civil polity, their republican institutions, and the exigencies of their world-wide commerce, demanded legislation of the most liberal character; and it does not seem probable that any monumental ruins will ever be uncovered, like those of Egypt and Mesopotamia, to throw light upon the subject, unless, indeed, illumination may be derived to us from the excavation of the palace of Minos in Crete and the civilization thereby revealed, or from some yet undiscovered monument of Hittite civilization in Asia Minor.

Indirectly, however, and in a general way, the excellence of the Phœnician law is testified to by the tribute paid to it by the greatest of Greek philosophers, possibly the greatest philosopher of all time. In his work on Politics and Economics, or Political Economy, as we would now call it, Aristotle, referring to Carthage, stated that its institutions were in some respects superior to those of any of the Greek States (Aristotle, De Politica, Book II, Chap. 11). And by the term "*institutions*" he means not merely the governmental structure and organization, but more especially the tenor of the law. And inasmuch as it is universally conceded that the "*institutions*" were substantially identical with those of its pa-

rent state, Tyre, what the great Greek philosopher says about the one is equally applicable to the other. Carthage was yet standing and powerful in his day; Tyre had just fallen and been destroyed. Similarly, the legislation of Minos in Crete was undoubtedly of Phœnician origin, and was famous throughout all the ages of Grecian greatness, notwithstanding that it had perished long before Athens and Sparta rose to power.

There is another remarkable fact that may be mentioned. Our maritime and admiralty law, as we call it, the law of all the civilized world to-day in respect of marine transactions, has been traced back through the Roman Civil Law to the laws of the little island and the city of Rhodes, in the Eastern Mediterranean, at the southwestern angle of Asia Minor, well known to have been a colony of Phœnicia; and while we can not trace the stream any farther than from Rhodes, it is most natural to infer that the fountain head was in Phœnicia.

The Phœnicians came into frequent contact with the Babylonians. They not only maintained a commerce with them by means of the Euphrates River, but they also were their rivals and co-operators in the Indian Ocean. Indeed, one of the traditions preserved by the historian Herodotus in regard to the origin of the Phœnicians brings them from some islands in the Persian Gulf in close proximity to the early maritime cities of Babylonia. It is not unlikely, therefore, that these enter-

prising navigators should have borrowed for themselves some of the best features of the Babylonian law.

But with this conjecture, and with these general remarks, we must dismiss the subject of Phœnician law from our further consideration. One of the most interesting chapters in the annals of time was closed to us forever, and became a sealed book, when Alexander of Macedon completed the work of Nebuchadnezzar and laid Tyre in ashes.

3. Egypt.

On the banks of the Nile was located the third of the three great seats of primeval civilization. Egypt holds with Phœnicia and Babylonia the honor of radiating all the ancient civilization over the world. The philosophers and statesmen of Greece all sought in Egypt the source of most of their own institutions; and Roman Emperors resorted to Egypt for wisdom. Even in the days of Moses, Egypt was noted for its learning; and the Hebrew lawgiver did not hesitate to adopt several of its laws and institutions for his own countrymen. Solon studied deeply those laws and institutions before he promulgated his own code for Athens.

Under the influence of successive conquests and devastations, the Pharaonic civilization perished, as did that of Phœnicia and Babylonia. Memphis, Thebes, On and Tanis, the great cities of Egypt, fell, as did Tyre and Sidon and Babylon and Nineveh; and with them depart-

ed the glory of their great accomplishments, their arts and sciences, their language and their religion, their philosophy and their law. But the Egypt of the Pharoahs has left the most remarkable monuments of the world in its wonderful ruins. As we have already stated, it is only within the last seventy years that from beneath the sands of the desert and the accumulation of twenty-four centuries of ruin some remnants have been uncovered of the great civilization of Asshur and Babylon. Many of the monuments of Egyptian greatness have always remained standing and stately and visible to the eye of the traveler, although in ruins. The Pyramids and the Sphinx still rear their gigantic dimensions on the western bank of the Nile, as they did when Alexander of Macedon, and Cambyses the Persian, and Nebuchadnezzar of Babylon, and Asshur-bani-pal of Asshur passed by in their lurid career of conquest; and the temple shrines of Ipsambul and Karnak, testifying to the glory of ancient Thebes of the Hundred Gates, yet show the magnificent granite columns erected ages ago, before Rome was, before Homer sung, before Athens had a name. And supposed to have been successfully concealed from the foreign spoliator, the tombs of the Pharaohs in the Libyan Hills that were fondly hoped to have been sealed till the judgment day, have given forth their dead, and have given us a vast insight into the life and history of ancient Egypt.

Here everywhere have been found inscriptions in the

language of the Pharaohs, which, long a puzzle, have during the course of the century just past been deciphered. From beneath the dust of ages *papyri* have been unearthed which tell us something of the lore of the ancient priesthood; and, although we are not yet able, and probably never will be able, to reconstruct the lost history of Egypt, we have learned enough to get some idea of the manners and customs, laws and institutions, which, even in their decay, elicited the admiration of Plato, Herodotus, and Diodorus Siculus.

It is a singular thing, that, although we have greatly more copious monumental records of the ancient Egyptian civilization than we have of the civilization of Asshur and Babylon, yet the remnants which we have of Asshur and Babylon give us a far greater insight into their laws than the Egyptian records give us of the legislation of the Pharaohs. In Explanation of this it has been assumed by some that the civilization of Egypt was of a more primitive type than that of Asshur and Babylonia, and that the Egyptians were never a sea-faring people, and were always less enterprising than the cognate Hamite races of Babylonia. But this assumption is not supported by the known facts of history. The "Wisdom of the Egyptians," in which we are told that Moses was instructed (Acts of the Apostles, ch. vii: 22), the fact that Egypt from its location on the Nile and the Red Sea and along the shores of the Mediterranean must necessarily have been a great sea-power, and upon the

authority of Diodorus Siculus, at one time held the Empire of the Mediterranean (B. C. 787-734) and may have held it many times before, and finally the eminence reached by the Egyptians in the arts and sciences, and especially in philosophy, would indicate that they were equally proficient in legislation. Moreover, among their monarchs five are specifically mentioned by Diodorus as great legislators—Mnevis (the name which he gives the founder Menes), Sasychis, Sesoosis (the Sesostris of Herodotus), Boccharis, and Amasis—two of whom, Boccharis and Amasis, lived in the later days of the monarchy, and one of whom, at least, Boccharis the Wise, as he was called, gained renown for the wisdom of the laws which he enacted.

Whatever may have been the cause, there are but few traces left of the legal system of ancient Egypt. The political organization of the country recognized a division into Upper and Lower Egypt—in later times, into Upper, Middle, and Lower Egypt—and a subdivision of the whole country into thirty provinces designated as nomes. The Middle District is known to have comprised seven of these nomes, and therefore in the Greek times received the Greek name of Heptanomis or the Seven Nomes. In each nome and in the principal cities of the several nomes there were local judges; and there was also a great central court, composed of thirty judges, ten from each one of the three districts, or from their three principal cities, Thebes, Memphis, and On or Heli-

opolis (the City of the Sun). One of their number, we are told, was chosen or appointed president of the tribunal, and thereupon another was chosen from his city or district to fill the place left vacant by him, so that the number of judges, exclusive of the President or Chief Justice should always be kept at thirty. This would seem to indicate something like a selection of judges by some kind of electorate rather than by the monarch. All the judges both of the central and the local courts appear to have been selected from the sacerdotal caste, which engrossed to itself not only the ministry of religion, but likewise the practice of medicine and the administration of the law. The king, of course, as in all ancient nations, occasionally administered justice in person, but, as the historians have remarked, the king of Egypt, although springing not from the sacerdotal but from the warrior caste, was always at his accession initiated into the mysteries of the priesthood, and thereby became affiliated with the priestly class, the possessors of all the knowledge of the time.

The system of caste or class, to which we have referred, was not wanting in any ancient, or many modern nations of the world. It is not extinct to-day in the presence of the dominant democratic sentiment of the Twentieth Century; but it reached its greatest development in ancient Egypt and modern Hindustan. In both of these countries the priesthood and the warrior class divided all power between them, the priesthood, of course, by the

power of intellect, being generally predominant. It would seem that in Egypt these two orders constituted something like a feudal class which owned most of the land and leased it out for cultivation to the class of agriculturists.

From the monumental records of Egypt and from the sparse notices of the historians we learn enough to show us that in the Egyptian courts there were written pleadings, not substantially different from our own at this day; that there was examination of witnesses for each side; that there were no speeches by advocates for either party—forensic eloquence seems not to have been cultivated in the Land of the Nile; that the courts decided by a vote of the majority of its members; and that no costs were ever charged against either party, in order that justice might always be free to all, a principle which, although perhaps not practicable in our modern conditions, certainly has theoretically many considerations in its favor.

With reference to the domestic relations, it is a peculiar fact that in Egypt the matrimonial union seems to have been placed on a greatly higher plane than in most of the other ancient nations, not even excepting that of Israel. While it is true that both polygamy and divorce were allowed, yet both were of rare occurrence, and may be regarded as almost exceptional. The husband and wife were equal in the household. According to the historian Diodorus Siculus, the wife seems to have been

often the head and the ruler of the household, and the source of title to property, which appears to have been more frequently derived through the female than the male line of ancestry. And these conditions, as he states, were the result of happy institutions prevailing in the golden age of Egypt, when Isis and Osiris reigned, and Osiris was the willing subject of his queen and goddess, Isis. It would seem, also, that in all ages married women in Egypt had the absolute control of their own property and separate estates, notwithstanding the matrimonial relation, and their husbands exercised no dominion over them, as under our English common law system.

Not so much of legal as of social importance was the peculiar matrimonial custom which prevailed in Egypt, but which is abhorrent to our ideas, the incestuous union of brother and sister in marriage, a custom which is also traced back to the happy union of Isis and Osiris, who bore to each other the same double relationship. How extensive this practice was during the old Pharaonic times, we are not informed; but it is a peculiar fact that it was taken up and very generally followed by the royal line of the Macedonian Ptolemies, when, upon the disruption of the Empire of Alexander the Great, Ptolemy Soter, one of the ablest of his generals, established the Hellenic Kingdom of Egypt, with its capital at Alexandria. And it is, perhaps, a still stranger fact that, in that famous royal race, probably the most generally talented royal race that ever existed, the custom produced none of that

mental disorder and degeneracy, which in modern times have been found to result from the marriage of persons nearly related to each other by blood, and which in many states and countries have led to the enactment of laws prohibitory of such marriages. It is, of course, the universal rule of our modern civilization, derived to us from the tenets of our Christian Religion, that such union as that of Isis and Osiris can not be tolerated; but statutes, both religious and civil, have gone farther, and have prohibited the intermarriage of persons not so nearly related. The ecclesiastical is usually more rigorous in that regard than the municipal law, and extends its prohibition to the fourth degree of kindred. You may recall a remarkable illustration of what we may designate as the Egyptian system in the famous Queen Cleopatra, the heroine of the most troublous time in all the world's history, and who, herself the daughter of parents nearly related to each other, had been married in the earlier part of her career, against her own wishes however, to her brother Ptolemy, who was by some years her junior.

Children, also, played a more important part in the Egyptian household than among other nations. This again was the result of their religion. Isis, Osiris and Horus—mother, father and son—constituted the triad of Gods most popular in Egypt; and singularly enough, all their gods were grouped in triads. And so in the household the mother, the father, and the son constituted the perfect family. Property passed by inheritance,

more frequently from the mother than from the father to the son; and it was not unusual for a father to transfer his property to the mother, so that the son might inherit from her.

Wills and testaments would seem to have been practically unknown in Egypt before the days of the Ptolemies, when, with other Greek usages, they were introduced into the civil polity of the country. During the Ptolemaic period there are several instances related by the historians of the sovereignty itself being transmitted by will. Ptolemy Auletes, the father of Cleopatra, assumed by will to settle the monarchy and its dependencies among his four children.

As might naturally have been expected, there was considerable similarity in some respects between the institutions and the laws of Egypt and the corresponding provisions of the Mosaic Code. Both systems had the week of seven days, and the same punishment for perjury and false testimony. Both codes were equally mild in their criminal branches, as compared with the more severe penalties imposed by various other nations; and in both there were provisions for the commutation of penalty on the ground of extenuating circumstances. The death penalty in Egypt was frequently commuted to penal servitude, either in the granite quarries of Upper Egypt and Nubia, or in the mines of the Sinaitic desert in Arabia. The provision was presumed to be in the interest of

mercy; it was generally cruel enough in practice, and no better than a living death.

We have mentioned the fact that the sacerdotal and the warrior classes in Egypt owned most of the land, and merely leased it to the agricultural class for tillage. Contracts of lease have been found, in some of which a fixed rent is provided to be paid, in others a fixed share of the produce. There would likewise seem to have been in effect a system of registration of the title to land.

Mortgages and pledges were in use, and the rate of interest upon loans was regulated. A peculiar form of pledge was that of the body of one's parent or ancestor, carrying with it the use of the family sepulchre,—a form of pledge which derived its force from the Egyptian love of ancestry and the peculiar and most extraordinary care taken for the preservation of the bodies of the dead by embalmment, so that they should be ready for the resurrection. The resurrection of the body and the immortality of the soul were in some manner connected in their religious system; and the preservation of the body intact was deemed to be necessary for its resurrection. No more binding pledge, therefore, could have been given than that of the possession of the burial ground.

The laws of Egypt commended themselves to the admiration of Solon, Plato, Aristotle, Herodotus, and Diodorus Siculus. It is presumed that they had much influence on the legislation of the great Athenian lawgiver, as well as on that of Moses. Thus they may have greatly

influenced the current of human thought and of human history, notwithstanding that, with the dim light before us, we are unable to see that they directly affected the institutions of subsequent ages.

The history of Egypt before Alexander the Great, who entered the country in the year B. C. 331, rather as its deliverer from Persian domination than as a conqueror, covers a period of upwards of two thousand five hundred years, during which it underwent many vicissitudes from changes of dynasty, intestine conflict and foreign conquest, from plague and pestilence, war and famine. Notwithstanding that these vicissitudes must necessarily have caused many changes in its laws and customs, it would seem that the local institutions of the Land of the Nile perpetuated themselves with remarkable tenacity, became blended with, rather than effaced by, the Greek civilization of the Ptolemies, and yielded at last only to the all-conquering power of the Roman arms, and to the yet more potent influence of the Roman Law. Whatever remnant of them was left and survived through the period of Roman domination was utterly annihilated by the savage fanaticism of the Mohammedan Conquest in A. D. 639. And not the laws alone of ancient Egypt, but much of the literature of the ancient world perished, when the ruthless invaders destroyed the great Alexandrian Library.

CHAPTER IV

DEVELOPMENT OF LAW IN HINDUSTAN, CHINA, MEDIA AND PERSIA

1. Hindustan.

Mesopotamia, Egypt and Phœnicia were the three great centres from which civilization radiated over the ancient world; and from them and from Palestine, through the medium of Greece and Rome our own civilization has been derived. But we are not without indebtedness to another and more distant land, which has exerted a greater influence upon our usages and customs than has been generally suspected. I refer to the great peninsula of Hindustan.

More than a passing glance does Hindustan deserve from the student of law. To the historian and the archaeologist it is a country of surpassing interest. In one sense its civilization is of more importance to us than that of Babylon, Asshur, Egypt, Phœnicia, or even Palestine. Babylon, Egypt and Phœnicia were Hamite nations; Asshur and Palestine were Semitic. The people of Hindustan, although locally far removed from us, belong

to the same great Aryan Race to which we ourselves belong, and which comprised Greece and Rome, and most of the nations of modern Europe. More than four thousand years ago their ancestors and ours were intermingled on the Plains of Bactria, the great central region of Asia which may be said broadly to extend from the River Indus to the Sea of Aral, and where grew up the famous cities of Bokhara, Samarcand, Meru, and Herat. From this central seat two great streams of emigration flowed, one southeastwardly across the Indus, through the plains of Hindustan, to the Vindhya Mountains and the Bay of Bengal, the other westwardly to the great table land of Iran or Persia. Or rather there would seem to have been repeated waves of emigration moving westward and resulting in the establishment of Celts, Teutons, Sclavonians, Romans, Illyrians, and Greeks as distinct nationalities, and succeeded by the last movement, that of the Aryans of Persia, which under the leadership of Cyrus and Darius Hystaspes, reached the shores of the Mediterranean and profoundly affected the history of all the western world.

Two rival and apparently hostile religious systems seem to have been involved in the later emigration, one the Zoroastrianism of Persia, and the other and the older one the Vedic religion of Hindustan. How far their institutions were modified by their religious antagonism, it is needless here to inquire.

In their new home on the plains of Hindustan the

Aryan Hindus developed a remarkably high degree of civilization. As evidence of this it will be sufficient to call attention to the fact that to them we owe the invention of the Arabic numerals, erroneously so-called, for they are not Arabic at all—and the decimal system of notation. They contend with the Babylonians for the honor of having inaugurated the science of astronomy, invented the zodiac, and elaborated the chart of the heavens; and they deserve the credit of having devised the game of chess and the greatly more popular playing cards. It has been justly said of them, that, in the domain of philosophy, they explored all the heights and depths of immortal thought, long before Plato and Aristotle marked the culmination of Athenian culture; and that they produced great epic poems which antedated even the immortal works of Homer, and which are read to-day by Sanscrit scholars with as much avidity, as were the poems of "the blind old bard of Scio's rocky isle" in the days of Hellenic greatness. Their literature is wonderfully copious, and their history is full of interest; and yet of chronological history it may be said that they have none. For their accounts of their country's past are so overladen with myth and fable, and so colored by their peculiar notions of religion, their doctrines of the transmigration of the soul and of re-incarnation, that it is impossible now to separate the substratum of truth from the vast superincumbent mass of fable with which their books are filled.

But very slightly dependent upon myth and fable is their well-developed system of law, the work, it is said, primarily of their great lawgiver, Manu. But who Manu was, or when he lived, or under what circumstances he wrote, it seems to be utterly impossible now to determine. Indeed, it is very greatly questioned whether there ever was such a person, in the sense of a great lawgiver giving laws to his country. The suggestion is that the Hindu legal system, being the result of continuous elaboration through the ages, required that, for its greater sanctity and efficacy, it should be attributed to some real or imaginary personage of long ago, some misty figure in the early records of the nation. However this may be, it may be assumed for our present purpose, that, while the Laws of Manu in their present form only date from the early centuries of the Christian Era, yet in their substance they embody the customary law of more than a thousand years before that time, contemporaneous probably with the greatness of Phœnicia, whose enterprising merchants undoubtedly reached the shores of Hindustan.

The Laws of Manu, it may be stated, are not in themselves authorative, as was the Law of Moses, or the Laws of Solon, or the Justinian Code, or the Code Napoleon, when these were promulgated. They are authorative only as containing the immemorial usages of the people, in the sense that we regard the works of Coke and Blackstone upon our Common Law. And it may be added that the Code of Manu, although the most famous, the most

widely known, and the most generally accepted system of Hindu Law, is not the only compilation or commentary known in the Great Peninsula. For there are in Hindustan many different nations, with different usages, and consequently many different systems of law. The Code of Manu, however, as stated, is that which is most generally recognized, and it is that to which English lawyers, concerned with the administration of justice in Hindustan, most frequently appeal.

It may be remarked that, for the better remembrance of the laws by the people, and especially by the Brahmins, for whose special use the compilation was made, the Laws of Manu are written in verse.

In Hindustan, as elsewhere in the ancient world, the king was the supreme judge for his country; and in Hindustan there were generally many kings and many kingdoms. In the great monarchies of the old world all power was usually centered in the monarch. Theoretically his principal duty was to sit in judgment of the controversies of his people. Of course, it was impossible to do this except to a very limited extent, especially when the monarch's dominion comprised many cities and an extensive area of territory. The duty was necessarily in most cases delegated; and the delegation in the first instance was always to some official or tribunal at the residence of the sovereign. Even this royal court, in the course of the growth of population, soon, of necessity, confined itself to the more important cases, and to the

review of decisions of lower and local tribunals. Local courts for the determination of ordinary controversies, and a royal tribunal for more important causes and to act as a court of review and appeal, were the necessary instrumentalities for the administration of justice in all nations. They constitute our own system to-day; and we find that it was the same system in Hindustan ages ago. Every village and distinct community had its own court, composed of four, or five, or six judges, one a chief justice and the others associates, selected either by election of the community or sometimes by inheritance, according to local custom and usage. These local courts settled most of the controversies that arose, and proceeded more summarily and with less formality than did the royal courts.

In the royal courts of ancient Hindustan, the proceedings, as they appear from the Code of Manu, were strikingly like our own. Complaint was made in writing, and there was a specified time allowed for defense. Four kinds of defense were recognized, denial, confession, confession and avoidance, and previous adjudication. Then followed the production of witnesses, according as the judges determined upon whom was the burden of proof. Three witnesses were usually required to establish a fact. Testimony was taken under oath, and exception could be made to the capacity or competency of witnesses to testify. There was also in Hindustan, as in the former days of the Common Law of England, the mode of trial

by ordeal,—the ordeal of fire, the ordeal of battle, and the other ordeals mentioned by our old law writers.

The execution of judgment in civil causes was the weakest feature of the Hindu Law. It was practically left to the party himself in whose favor judgment had been rendered. Usually resort was first had to gentle measures, but if these failed, force could be used, seizure of property, imprisonment or enslavement of the debtor, and finally even homicide.

The Code of Manu is only the best known of the Hindu Codes; it is not the only one. But it is generally regarded as the best and most complete of them all in its arrangement and treatment of the law. How fully it covers the domain of jurisprudence may be seen from an enumeration of the eighteen heads under which it treats of the subject matter. These are: 1°. Recovery of debts; 2°. Deposit and pledge; 3°. Sale without ownership; 4°. Concerns among partners; 5°. Resumption of gifts; 6°. Non-payment of wages; 7°. Non-performance of agreements; 8°. Recission of sale and purchase; 9° Disputes between owners of cattle and their servants; 10°. Disputes regarding boundaries; 11°. Assault; 12°. Defamation; 13°. Theft; 14°. Robbery and violence; 15°. Adultery; 16°. Duties of husband and wife; 17°. Partition of inheritance; 18°. Gambling and betting.

In the arrangement, as will be noticed, civil and criminal matters are somewhat commingled, and the classification fails to follow our classification of the subject.

Six of the titles—the 11th, 12th, 13th, 14th, 15th and 18th —appertain to the criminal law; one, the 16th, deals with the domestic relations, which seems to have been resolved into the principal one among them, that of husband and wife; and the other eleven treat of the rights of property, real and personal.

There are no peculiarities in the criminal law of Hindustan that greatly differentiate it from the criminal law of other nations, and it is unnecessary for us to dwell upon it here. Nor does the Hindu law of the domestic relations differ very greatly in the Code of Manu from what it was in the laws of Egypt and Babylon. Only more sharply, perhaps, in the Code of Manu than in the legislation of the two more western nations was the family defined and recognized as the fundamental social unit. Marriage was a solemn contract, but the personality of the wife was sunk in that of her husband, although to no greater extent perhaps than it was in the old Common Law of England. Divorce was allowable to the husband, but not to the wife; however, it seems to have been of exceedingly rare occurrence. Polygamy also was allowable to the husband, but its occurrence, like that of divorce, was exceptional. There is evidence to show that the corresponding practice of polyandry also prevailed at some periods in the history of Hindustan. The Law of Manu knows nothing of the abomination of suttee, or the self-destruction of widows on the funeral pyres of their husbands, which is a comparative-

ly recent innovation in the usages and customs of the country.

The system of caste, which, as we have seen, prevailed to a considerable extent in Egypt, reached its greatest development in Hindustan, and profoundly affected the whole social polity of the people. But even this is of somewhat later growth than the time of Hindustan's greatest prosperity. It may be said, in fact, to have been confirmed and become intensified by the loss of national independence, when the barbarians from Northern Asia and the worse Mohammedan barbarians from Arabia overran and conquered the country in the eighth and ninth centuries of the Christian Era. Under its harsh and unnatural system of discrimination the grossest inconsistencies were introduced into the law. The killing of a Brahmin, for example, became the most atrocious of all offenses, pardonable neither in time nor in eternity; while the killing of a pariah under precisely similar circumstances was an offense of very venal character.

Community of property, what we now call communism, was the law of the family, and generally also that of the Hindu village, as in all the early Aryan communities, and as to-day in many parts of Russia. The father, and after him the sons in succession, were the managers of the common property for the common interest. This common property could not be alienated, although property specially acquired by the owner, as by gift or in war, might be disposed of by him. Wills appear to have been

unknown to the law as stated by Manu, and all property passed by inheritance, and was equally divisible among all the children, male and female, with some discrimination however in favor of the sons as against the daughters, and of the older sons as against the younger. Often, however, the property remained undivided under the administration of the oldest son until the death of the mother, who was entitled to a substantial provision out of it for life.

Land could be acquired not only by inheritance, but also by prescription, the period of which seems to have varied according to the notions of different writers, some placing it at twenty, some at thirty, and others at sixty years. Probably the difference was one of local custom. Possession for three generations, amounting to one hundred years, and regarded as the extreme limit of human memory, was finally accepted as the general period of prescription. Title to chattel or personal property could be acquired by continuous peaceable possession for ten years.

Mortgages of land for the payment of debt, which were common in Egypt and Babylonia, seem to have been almost unknown in Hindustan; but pledges of personal property for the security of debt were common enough, and the law of bailments was elaborated to the greatest degree of refinement. The taking of interest was discouraged, yet was allowed, but in general not to exceed in the aggregate the amount of the principal sum lent.

Contracts were sacredly guarded in the Hindu law. Frequently they were made under oath, and when they were so made, their violation was regarded not only as a civil injury, but also a criminal offense. Contracts were held void substantially in the same contingencies in which we now hold them void; and there were, as with us, cases in which, although a contract was not fully performed, a *quantum meruit* was recoverable. In the matter of torts, however, considerable difference may be noted between the Hindu law and ours. For example, a master was not in general responsible for the torts of his servants even though done in the course of their duty, nor was the owner of animals, such as dogs or horses, liable for damage done by them.

On the whole, the Hindu law, as it appears in the Code of Manu, was an elaborate system of regulation, and notwithstanding that it contained many provisions from which we would dissent, it is worthy of our admiration. It is a code of an agricultural and pastoral, rather than a commercial people; and therein it differs from the Babylonian and Phœnician systems, and more nearly resembles that of Egypt. Our own Common Law of England was equally the patrimony of a people long agricultural and pastoral, before it became commercial.

The civilization of Hindustan, as we have intimated, was coeval with that of Egypt and Asshur and Babylon and Phœnicia, and long antedated that of Greece and Rome, but it may be said to have outlived them all, and

to have been perpetuated to the present day, not in its pristine vigor, and yet not in ruins. Hindustan is a vast and wonderful country, equal in area to nearly half of the United States, and containing many kingdoms and nations, with people of varied race and usage and custom. The Code of Manu, as already intimated, is not the only extant exposition of Hindu Law. There are others not as widely accepted. The fact is that in different localities of the vast Peninsula different customs have obtained, and different systems of law have grown up; and while between these there is a general resemblance, yet that which is law in one province is not necessarily so in another. It is just as with our own union of the States. Hindustan has rarely formed one united empire, and never an entirely homogeneous one. By the treaties between the British Government and the native princes, under which England holds the control of the country, there is guaranteed to the people the enjoyment of their native laws, with their own courts to enforce them, subject to the appellate jurisdiction of a Supreme Court under English supervision. Consequently for the English lawyer and the English nation generally the laws of Manu and the Hindu Codes are not mere matters of speculative or archæological interest, like those of Tyre and Babylon, but are of present and even growing importance as containing the rule of action of one of the most acutely intelligent races, numbering over one hundred millions of people, that has ever appeared on the

stage of human history, and which forms the most valued dependency of the British Empire.

2. China.

Turn we now for a moment—it need be only for a moment—to the vast and populous Empire of China, the eldest organized nationality now existing on the face of the earth, and whose institutions therefore may well be assumed to have been and to continue to be of the most stable and permanent character.

The latest problem to confront the Aryan nations of the world and our aggressive and now presumably dominant Aryan civilization, is that which results from sharp contact and more than probable conflict with the civilization of China, which was old long before the Argive hosts of Agamemnon warred against Troy, and which boasts a continuous existence for upwards of four thousand years, and which also, although the Chinese Empire has often enough been overrun and conquered, has never failed to overcome its conquerors. Shut out from intercourse with the other great nations of the world by the loftiest mountains on the globe, by sandy deserts and almost impassable forests, China stands, and has stood for ages unique and alone, with about one-quarter, perhaps even one-third, of the human race within its borders, and with institutions that have no parallel anywhere else on earth. Epigrammatically, and therefore necessarily with some exaggeration, although not without justice, an Eng-

lish writer (Wingrove Cook) has written of China in these words: "It is a land where the roses have no fragrance and the women no petticoats, where the laborer has no Sabbath, and the magistrate has no sense of honor, where the needle points to the south and the sign of being puzzled is to scratch the antipodes of the head, where the place of honor is on the left hand and the seat of intelligence is in the stomach, where to take off your hat is an insolent gesture and to wear white garments is to put yourself in mourning."

From our standpoint China is a country of contradictions; and yet, when its contradictions are properly understood, they are not illogical or unreasonable. Its civilization, as has been indicated, antedated our own by many ages; and curiously enough, it anticipated many of our greatest inventions, although it never perfected them. It had the mariner's compass, the printing press, and gunpowder, long before any of them were known in Europe. It has had for ages a scheme of education as universal in its character as our common school system. It is the most paternal, and yet the most democratic of nations. It has no privileged castes or classes, and yet it is conservative in the extreme. Its government is that of absolute and irresponsible monarchy; and yet all preferment to office is based upon the theory of merit, and the sole passport to office is literary attainment. Our system of Civil Service is in its infancy as compared with that of China. The great Empire has had a most copi-

ous, yet in its scope exceedingly limited literature. It has produced its warriors and statesmen, and three great philosophers, Confucius, Mencius and Laotsze, who do not suffer by comparison with the brightest intellects of Greece and Rome, or of our modern world. They flourished two thousand five hundred years ago, but their works and their influence are yet potent, and the morality of Confucius at least is not unworthy to be ranked next to that of Christianity.

China was not always weak in war as it is now. Its power once dominated all Asia as far westward as the Caspian Sea; and even as late as the year 1878 one of the most brilliant campaigns in the military history of the world was that of the Chinese general who led his army through the tremendous mountain defiles of Eastern Bokhara and crowned a long march of over a thousand miles with the triumphant storming of the rebel stronghold of Kashgar. It would be rash to assert that organization and a competent leader, some new Genghis Khan or Timur, might not enable the Chinese to overrun Asia again, perhaps to overwhelm Europe, at all events to hold its own against the Western nations.

The institutions of China may be said to be based almost exclusively on the theory of paternalism. Filial piety, worship of ancestors, veneration of the past, and adherence to precedent, comprise the whole of their civil and moral code. It is not in theory the worst system that

could be imagined. It is certainly more sensible, for example, that, when a man is honored for his distinguished services to the State, the honor should culminate in the ennobling of his ancestors who deserve credit for having produced such a man, than in conferring an empty title to be borne by worthless and profligate descendants, too often a disgrace to their lineage and their race.

The penal law of China is lenient enough in theory, but cruel and barbarous in its administration. The bastinado, exile, and death are the usual penalties for crime; but confiscation of goods and the slaughter of whole families and even the massacre of whole villages and communities, for the offense of one individual, are not of infrequent occurrence. Great latitude is left to the local magistrates, which means that the law is uncertain; and bribery, both in executive office and in the administration of justice, although stigmatized in the law as a criminal offense, is most notorious in practice. The principle of paternalism, which makes the parent absolute in the household and the official all-powerful within the domain of his authority, has led to the punishment of the violation of civil contracts as a criminal offense—a crude expedient characteristic of a primitive state of society, but in which, however, the Chinese law somewhat resembles the Code of Manu in Hindustan. With reference to this matter of contracts it may be added, that the merchants of China, although remarkably keen and shrewd

in their bargains, are yet the most thoroughly honest and reliable in the world.

China has no lawyers, and it may be said to have no code or system of law beyond the rule of filial piety and adherence to precedent which have been mentioned. These are presumed to comprise everything. The oldest of nations, it is yet in a rudimentary state, so far as the development of law is concerned. In this regard we have little or nothing to learn from it, except as to the dangers that lurk in paternalism.

3. Media and Persia.

Turning again westward through Asia, we encounter the great nation of the Medes and Persians, who for three hundred years dominated all the southern part of that continent and cast a threatening shadow over Europe.

In reference to Hindustan it has been mentioned that in the early days, fifteen hundred or two thousand years or more before the Christian Era, two great waves of emigration of our Ayran Race, the race to which we all or most of us belong, moved from the central region of Bacteria—one, that of the Vedic Hindus, southeastward to the River Indus and the plains of Hindustan as far as the Vindhya Mountains and the Bay of Bengal, and the other, that of the Medes and Persians, southwestward to the great table land of Iran, more familiarly known to us by the name of Persia. It is to this second wave of pop-

ulation that I would now for a moment direct your attention.

The Medes and Persians, who occupy so large a space in the annals of Greece and therefore in the history of the world, seem to have been cognate tribes of the same branch of our Aryan Race, apparently speaking the same language, professing the same religion and possessing the same manners and customs, at all events without substantial difference in this regard between them. The common ancestors of both had adopted in Bactria the peculiar dualistic creed of Zoroaster, which recognized a Spirit of Good and a Spirit of Evil, Ormuzd and Ahriman, eternally at war with each other—a creed in sharp antagonism to the religion of the Vedic Hindus. The Medes, who seem to have been the first part of the two tribes to move westward, came into armed conflict with the great Empire of Asshur, and were at first repulsed and driven backward, or forced into a temporary submission to the Empire by its great monarch Asshur-banipal, or Sardanapalus the Warrior, but finally overwhelmed the Assyrian monarchy under the second and more effeminate Sardanapalus and laid the great City of Nineveh in ashes and ruin, from which it never arose again. The Persians, who soon afterwards succeeded to the hegemony of the allied tribes previously held by the Medes, conquered Babylon in the year B. C. 536, under their famous chief Kai Khosrou, or Cyrus the Great, subdued and annexed all Western Asia to their dominions,

and even incorporated into their empire Egypt as far as the cataracts of the Nile, Libya to the borders of the Great Desert, and Thrace and Macedon in Europe. The supremacy of the Persian Empire was acknowledged from Cashmere beyond the Indus to the Aegean Sea, the River Danube, and the Adriatic; and even distant Carthage on the western Mediterranean for a time paid tribute to it. It seemed as if the Medo-Persian Empire were about to dominate the world and to mould the destinies of mankind, for good or for evil, through all the ages.

Cyrus the Great terminated the Babylonian Captivity of the Jews, and enabled that people to return to their own country, and there to re-establish their own laws and institutions, which were destined under the New Dispensation of Christianity to revolutionize the world. Darius Hystaspes, the second in succession from Cyrus, was the great organizer and legislator of his country; and he was also the first monarch of Persia to come into conflict with the Greeks. It was in his reign, in the year B. C. 490, that the great Battle of Marathon was fought between his army of 110,000 men under the command of his generals Datis and Artaphernes and the Athenian army of 10,000 men commanded by Miltiades—the first of three great battles of the world in which the civilization and the destinies of the human race hung sharply in the balance. It was not probably the first great contest between Europe and Asia; the War of the Argives against Troy immortalized by Homer may possibly claim

that distinction. But Marathon was the first and most decisive battle in the long contest of 160 years between Greece and Persia, wherein the issue was whether Hellenic freedom, with all that it implied for the welfare of humanity, or Asiatic absolutism was to triumph. The contest was ultimately decided by the utter overthrow and destruction of the Persian Empire by Alexander of Macedon on the battlefield of Arbela, B. C. 331.

The Persian Monarchy, like all the other great monarchies of Asia, was an absolute despotism; and the Greeks included the Medes and Persians in the general designation of *Barbarians* which they gave to all non-Hellenic nations. But the Greek word *barbarian* did not mean what ours does; it corresponded rather to our words *alien* and *foreigner*. And the Medo-Persians were very far from being barbarians. The nation, which first established a postal system, crude and insufficient though the system was, could not well have been barbarian, in our sense of that term; and it was Darius Hystaspes, so far as we know, who first established a postal system. Moreover, the religion of the Medes and Persians—Zoroastrianism, as it is called from its great founder Zoroaster—was by far the purest, the most noble, and the most elevated of all the religious systems of the world, ancient or modern, outside the monotheistic creed of Judaism and Christianity. It was infinitely superior as a religious system to the gross polytheism of Greece which that classic land had derived from Phœnicia, Egypt,

Asshur, and Babylon. It was afterwards corrupted, it is true; and only in its corrupt form has it been perpetuated to this day.

As in the cognate Vedic system of Hindustan, so also in Zoroastrianism, the human and the divine law are greatly commingled. Indeed, this is the characteristic of most of the ancient systems of law, not excepting even the Mosaic Dispensation, the rigidity of which, due in great measure to this fact, and enhanced by the interpretations of the rabbis in the Asmonean and Herodian periods of Jewish history, led to the success of the milder and more rational system of Christianity. The rigidity of the laws of the Medes and Persians superinduced their practical abandonment long before the downfall of their Empire. And yet it is the character of immutability attached to their laws, one element in their rigidity, that induces our consideration of them.

Twice in one chapter of the scriptural Book of Daniel (Chap. vi. 8, 12) reference is made by the distinguished Israelite writer to "the law of the Medes and Persians, *which altereth not,*" as though this characteristic of immutability were something peculiar to the Medo-Persian system; and we are likewise told by several of the Greek historians who have written of Persia, that the edicts of the Persian monarchs were irrevocable. It would seem that this quality of immutability had some influence in controlling the arbitrary action of the Persian monarchs with reference to their system of law, and

was of much force in the early days of their Empire, under such monarchs as Cyaxares, Cyrus the Great, and Darius Hystaspes; but is was of little consequence in the days of degeneracy.

The Persians were not a commercial people; indeed they would seem to have despised commerce, and left the pursuit of it wholly to the other races that were included in their vast empire. Consequently they had no commercial law. It might be a source of curious inquiry whether it was not on this account that they detested the vices of falsehood and perjury above all other vices, since falsehood and perjury are so generally the result of commercial transactions. History tells us very little of any branch of their law other than the criminal. And here as in many other cases, their theory was often very much at variance with their practice. In theory it was the rule of their law that no first offense of a capital nature should be visited with capital punishment; in practice, no such lenity was allowed to prevail. In theory no man could be found guilty without being confronted with the witnesses against him, which is our own law; in practice, this may have been the usage also in ordinary cases, but the rule was never permitted to stand in the way whenever arbitrary despotism wanted a victim. The criminal law of Persia was remarkable for the extraordinarily cruel character of its punishments. It seems to have enjoyed a bad preeminence in that regard among the penal systems of the world, and no penal

system before the end of the Eighteenth Century has greatly erred on the side of humanity. Perhaps after that of Persia the Common Law of England has been the most systematically savage of penal codes.

CHAPTER V

LAW IN ANCIENT GREECE

1. Crete and Rhodes—Minos.

Let us pass over from Asia to Europe, from the Persians to their inveterate antagonists, the Greeks. The transition is not unnatural.

Like to the sun at noonday was the Civilization of Ancient Greece among the civilizations of the world. Never before and never since has there existed on this earth a people more energetic, more enterprising, more versatile, more ingenious, more artistic, more literary, more philosophical, more cultured in all the departments of human knowledge, than the Greeks of classical story, more properly designated by themselves in their own language by the name of Hellenes. And from this comparison I do not except any nation even of the nineteenth or twentieth century. Never before and never since have there arisen such poets as Homer, Pindar, Sappho, and Aeschylus, with whom only Dante, Shakespeare and Goethe of the more modern world may be associated.

Never before and never since have there been such orators as Domesthenes, and Aeschines, such philosophers as Plato and Aristotle, such historians as Herodotus and Thucydides, such leaders of men as Pericles and Epaminondas, such brilliant women as Aspasia and Hypatia, such sculptors as Phidias and Lysippus, such painters as Apelles and Parrhasius, such scholars as Aristarchus and Demetrius Phalereus, such physicians as Hippocrates and Galen, so many men illustrious in all departments of intellectual activity. The intellectual accomplishment of the Hellenes, and especially of that most illustrious of all the Hellenic States, the commonwealth of Athens, has never been equalled, much less surpassed by any community either of ancient or modern times. The Augustan age of Rome, the glory of Elizabethan England, the splendor of France under Louis XIV, pale into comparative insignificance before the wonders of Hellenic achievement. In art alone the Italy of Michael Angelo and Titian and Leonardo Da Vinci and Raphael rivals the most successful efforts of Hellenic genius.

And the Greek language, too—the language of the Hellenes—the human mind has never evolved a form of speech more magnificently beautiful, more superbly adequate to express all the conceptions of the human intellect than the language of the Hellenes. We are sadly mistaken if we suppose that it is a dead language. It is very much alive. Even to-day we think and we speak in Greek; and science would be lame and halt if it did not

have that wonderful language upon which to draw in order to give name to its latest and greatest inventions—to the telegraph, the telephone, the photograph, the phonograph, even the bicycle and the automobile—all of which terms have been manufactured from Greek originals. When it was desired to give an appropriate name to the greatest discovery of modern medical science, we were compelled to resort to the Greek language for the word *anaesthetic*. And so a thousand other improvements and inventions of our wonderfully inventive age have required Greek names to emblazon them to the knowledge of mankind. And thus it is that the thought and the language of the Hellenes have left their indelible impression upon the thought of the human race through all subsequent ages.

The Hellenes never constituted one nation. It may be said that there never was such a country as Hellas. The Greek writers never wrote of Hellas, but of the people Hellenes, intense in their nationality even without being a nation, and occupying not only the little country called Greece, but likewise a thousand colonies scattered over all the coasts of the Aegean, the Black and the Mediterranean seas, from Tauric Chersonesus to the Straits of Gibraltar. Bound together were these widely scattered Hellenes by the bond of a common language and a common religion, by their common shrine sacred to Apollo at Delphi, by the Olympic games held quadriennially at Elis, by the poems of Homer, and their enthusiastic de-

votion at all times and everywhere to the principles of civil liberty as they understood them. Scattered wide as they were, and never united into one compact nation, the Hellenes had a common civilization and a unity of purpose in the development of the world's history which even more compact races have never had. Even Rome only took up and carried on the great work which the Hellenes had so well matured.

We have said that the Hellenes were ardently devoted to the principles of civil liberty. In the days of their greatness they had republican institutions, and it was the freedom of intellectual activity which these institutions superinduced that enabled the Hellenes to establish their wonderful civilization. That civilization is our civilization, with only the monotheism derived to us from republican Israel superimposed upon it. Only republican institutions, it may be remarked parenthetically, are competent to develop the highest civilization. Witness republican Israel, republican Greece, republican Rome, the republican States of Italy in the period of the Renaissance, the republican States of Holland. To these sources we are indebted for all true progress in religion, in statesmanship, in jurisprudence, in science, art and literature, in all the great achievements of the human mind. By the republican principles propagated by them, America and France have made the civilization of the nineteenth and twentieth centuries possible. But this is a digression. Let us return to the Hellenes.

The civilization of the Hellenes is our civilization. Their science, their art, and their literature are the basis of our science, art and literature. Equally are we concerned with their laws and their political economy, for here also the Hellenes have travelled the same course over which we are travelling, and have had a similar experience in jurisprudence. They had to fight the same battle which we are fighting—the never ending contest between freedom and privilege. Law and legislation were their favorite topics; and from their earliest to their latest day the statesmen and the philosophers of the heroic race were ever busily engaged in the application of the problem of human happiness in organized society. They can offer us many a salutary lesson in jurisprudence and statesmanship.

Facing the southern shores of what we may designate as the mainland of Greece, and closing in to some extent the Aegean Sea from the main body of the Mediterranean, lies the island of Crete, about 170 miles in length and about 40 miles in width, being a little larger than our Long Island off the coast of New York, which in its general contour it somewhat resembles. It lies directly in the path of the hardy mariners of Tyre and Sidon; and no doubt it was the first of Hellenic lands to receive the germs of civilization from Phœnicia and Egypt.

About 1350 or 1400 years before the Christian Era the great King Minos reigned in Crete. His name among the Hellenes was almost symbolical of law and legislation.

He was of Phœnician origin. That wild and wondrous mosaic, known as the Hellenic Mythology, tells us that he was the son of a Phœnician princess, the beautiful Europa, the daughter of a King of Sidon, who gave her name to the continent of Europe, and whom Jupiter in the shape of a bull carried off on his back across the sea to Crete, where she gave birth to Minos. The mythological story no doubt has a meaning; it is unnecessary to inquire what it is. Suffice it to say that it indicates, what we are also told from other sources, that Minos was of Phœnician lineage. He became the ruler of a great maritime empire, which included the coasts of Asia Minor, the islands of the Aegean Sea, the mainland of Greece, and the island of Sicily, besides his own native island of Crete. He became likewise a great legislator, and established a code of laws for Crete which served as models for all the States of Greece in subsequent times. In the establishment and administration of these laws he had the assistance and active co-operation of his two brothers, Aeacus and Rhadamanthus. And so great in this regard became the fame of all three, that subsequently in the mythology of Greece they were represented as charged with the administration of justice in the Under-World of departed spirits. This and other circumstances gave rise in later days, the days of doubt and skepticism, to the inquiry whether any of them ever had actual existence. But we may regard it as now well established that Minos at least was a real personage, not-

withstanding the mass of myth and fable that cluster around him, and that he was in fact a greatly more active personality than the Hellenic chroniclers represented him to have been. Singularly enough, and most unexpectedly, his palace of Gnossus, the famous Labyrinth celebrated in Grecian story, has been recently uncovered, and proofs have there been discovered of a high civilization that long antedated the great war of the Greeks again Troy. The substratum of truth in the Hellenic mythology has been fully confirmed, as well as the reality of the connection between Crete and Phœnicia, if proof were in fact required for anything so well established in history. Most of all, the influence of Crete has been shown in shaping the early civilization of Greece, in which the legislation of Minos was greatly the predominant element.

The legislation of Minos enjoyed great fame and reputation among the Hellenes; it was consulted by all the legislators and by all the states of Greece in the formation of their own codes of law. And yet it may be said that we know absolutely nothing of it. It is true that Aristotle, in his work on Political Economy, or "Politics and Economics," as he himself terms it, has much to say of the laws and political institutions of Crete, in connection with those of Lacedæmon and Carthage, which three States he includes in a group of their own as having somewhat similar institutions, but of which he regards Carthage as the best. But the Crete to which

Aristotle refers was not the Crete of Minos, but the Crete of the Dorians; for the Dorian Conquest, which overwhelmed the Peloponnesus under the name of the Return of the Heracleidæ in the century following the war against Troy, also surged over Crete and introduced new conditions into that island, so that it is now difficult, if not impossible, to tell how much of the laws and the institutions of Minos survived to later times.

In historical times the Island of Crete never enjoyed the prominence which it had in the pre-historic ages. It played no part in the great drama of classical Hellenic story. It is rarely even mentioned in the pages of the Hellenic historians. It contributed little or nothing to the later Hellenic civilization; and yet there are indications that it possessed its full share of Hellenic culture. We refer to Minos and his legislation and the civilization which he developed in Crete, not because we have anything more than the merest fragmentary knowledge of that legislation, but on account of the profound influence which that legislation is conceded to have had over the legislation of the other Hellenic States, as well as afterwards over that of Rome. But while we know nothing of the legislation of Minos except thus indirectly and remotely, no account of the development of law would be satisfactory without some mention of the great Cretan lawgiver.

About 50 or 75 miles to the northeast of Crete, and just off the southwestern angle of Asia Minor, round

which the Phœnicians were required to turn in order to steer their course into the Aegean Sea, lies the little island of Rhodes, with one of the best harbors of the Mediterranean Sea. As in the case of Crete, Rhodes acquired renown for the excellence of its laws. It was a maritime state. For a time, about the year B. C. 900, it held, according to the historian Diodorus Siculus, the Empire of the Mediterranean. We know that it was from Rhodes that the Romans derived their admiralty and maritime law; the Roman historians so inform us. And, as we have derived our admiralty and maritime law from the Romans, our rule of conduct in regard to maritime transactions is necessarily the same in substance that prevailed in the little island of Rhodes three thousand years ago. The perpetuity, almost unchanged, of that branch of jurisprudence, through all the many vicissitudes of thirty centuries of storm and strife, is a remarkable evidence of the excellence of Rhodian law and of Rhodian institutions. It is greatly to be regretted that, similarly as in the case of Crete, we know little or nothing beyond this concerning the legislation, the institutions, the laws and customs of the little island of Rhodes, famous in after ages for its gigantic statue of Apollo, the Colossus, and perhaps even yet more famous for the heroic defense made more than a thousand years later by the gallant Knights of St. John against the overwhelming hosts of the Ottoman Turks.

Crete and Rhodes and Boeotian Thebes were the three

great outposts of the Phœnician civilization in the lands of the Hellenes; and it was immediately from them, and only mediately from Phœnicia and Egypt that the Hellenes derived the elements of their jurisprudence, as well as the remainder of their civilization, which may now be traced more distinctly in the States of Greece, which became of later prominence, the States of Athens and Lacedæmon or Sparta.

2. Sparta.

In the historic times Athens and Lacedæmon or Sparta were the most prominent of the Hellenic states. For a short time Thebes, the renown of which had been great in the prehistoric ages, again came rapidly to the front under the leadership of its two heroic chiefs, Epaminondas and Pelopidas, and for a time eclipsed both Athens and Sparta. Around these three, centered the history of Greece during the time of Hellenic greatness. Of these Lacedæmon may receive our first consideration, not because it was the oldest or most important—for it was probably neither—but because we may more readily dispose of it as being the least important in the matter of legislation.

Lacedæmon or Sparta was the capital city of a district in the southeastern Peloponnesus designated by the name of Laconia. The city seems to have been called indiscriminately by both appellations; and the people were known both as Lacedæmonians and Spartans.

There was perhaps a shade of difference between the two names; but it is unimportant here. There were in fact three different races in the country, the Helots, the Lacedæmonians proper, and the Spartans or Heracleidæ. The Helots became serfs, the Lacedæmonians proper constituted the bulk of the population, and the Spartans constituted a military aristocracy. These conditions were the result of successive waves of conquest that swept over the country, the last of which is known to history by the name of the Return of the Heracleidæ, sometimes as the Dorian Conquest, which occurred within the century succeeding the Trojan War. The races bore to each other a relation somewhat similar to that which existed between the Normans and the Anglo-Saxons in the centuries immediately succeeding the Norman Conquest of England in A. D. 1066.

You will recall the fact that four great divisions of the old Hellenic race were usually recognized by the Hellenes themselves—the Aeolian, the Dorian, the Ionian, and the Achæan, of which the Dorian and the Ionian became the most important. Sparta was the chief of the Dorian states, as Athens was of the Ionian. All had republican institutions, or what they so designated; but the Dorian states generally leaned to aristocracy in government, while the Ionian states were universally democratic. Athens was the bulwark of democracy in Greece, as was Sparta of aristocracy; and it is almost needless to recall the fact that the two were always rivals, fre-

quently enemies, and never reconciled to each other. In Sparta there was even an element of monarchy. They alone of all the Grecian states had kings during the period of Hellenic greatness—not one only, but always two at a time. But the power of the kings was greatly circumscribed, and was in fact no more than that of the Roman consuls. Although hereditary, they were no more than kings in name; the real power was vested in a Council of the Elders designated by the name of Ephori, generally consisting of five persons. There was likewise a Senate, corresponding to that of Rome, but apparently with less power.

No student of Grecian history can fail to have been impressed by the peculiar character of the Spartans and their peculiar position among the states of Greece. For some reason which history does not disclose, they were always entitled to the hegemony, as it is called, or the leadership of Greece, whenever the Greek states, or a majority of them, were combined against a common enemy, as they sometimes were against Persia. More frequently they led the Dorian states against Athens and the Ionian confederacies. And yet they were not in fact Hellenes at all, but a brutal band of barbarian adventurers from Asia constituting a purely military organization merely encamped in Greece, as the Goths and Vandals and Franks were encamped in the dismembered provinces of Rome after the destruction of the Roman Empire of the West. As compared to the other Hellenes, they

were and always remained barbarians. All their energies and their whole civil polity were directed towards the conservation and perpetuation of their military organization. The only art in which they sought to excel was the art of war. The arts of peace, which made Athens famous, had no place in Lacedæmon.

It has been the habit of historians to attribute the peculiar social system of the Lacedæmonians to the institutions prescribed for them by their great lawgiver Lycurgus, whose era is usually assigned to the year B. C. 884. We have, however, no means of ascertaining positively whether Lycurgus established the institutions of Sparta or merely remodeled them.

There are not many more noted names in the annals of legislation than that of the Spartan lawgiver Lycurgus. His institutions obtained a reputation in ancient times for which it is not easy to account on the score of their intrinsic merit, so far as we are advised of their character. It is true that these institutions had in them an element of stability and permanency which was wanting in the somewhat stormy democracies of Athens, Thebes and Miletus; and that they tended to foster the passion for military glory which seems to be inherent in all men as their heritage of barbarism from primeval ages of brutality. However, it must be remembered that admiration for Sparta and the Spartan institutions was most deeply rooted in the Dorian states where aristocratic and oligarchic principles prevailed in government; and

that the praise of them has come down to us mainly through the writers of Rome, where somewhat similar institutions to a certain extent were established.

It is more to the credit of Lycurgus, if he remodeled and humanized the institutions of his country, instead of creating them. The best institutions are not created; they grow. It is more probable that Lycurgus sought to civilize the semi-savage Heracleidæ than to originate their barbarous feudal organization. From Crete and from the Laws of Minos it is universally conceded that he had his inspiration. In the last analysis, therefore, the inspiration was from Phœnicia. It has been mentioned that Lacedæmon, Crete, and Carthage, in respect of their institutions, were grouped together by Aristotle; and one of these states, that of Carthage, was wholly Phœnician, while Crete was also in great measure colonized from Phœnicia. Indeed, there is good reason to suppose that the Heracleidæ or Dorians, who overran and conquered the Peloponnesus shortly after the Trojan War, were themselves in whole or in part from Phœnicia.

But, however, this may be, it is regarded as quite certain that much of the legislation of Minos in Crete is reflected in that of Lycurgus at Sparta. No doubt to Creto-Phœnician influence was due the establishment of the dual monarchical system at Sparta. That system, we know, prevailed in Carthage, and in other Phœnician states and colonies; although the Carthaginean and Phœnician *suffetes, sophatim,* or judges, as they were called,

two in number, were not hereditary, and had no royal title as in Sparta, notwithstanding that they generally held their offices for life. It was the same system which afterwards prevailed in Rome in the matter of the consulship, the term of which, however, was restricted to one year. Undoubtedly the Romans derived the institution from Carthage and Sparta. But in Sparta the kings were hereditary, notwithstanding that their power was greatly less than that of the Carthaginian *suffetes* or the Roman consuls.

To the same Cretan or Creto-Phœnician source was due the institution by Lycurgus of the Ephori, or Council of Five, in whom he reposed the real power of the Spartan state, and by whom even the kings were governed. The Ephori were a permanent body. Vacancies in their number, whenever they occurred, were supplied by the Senate. The tenure of their office was for life; and they constituted a veritable and most rigid oligarchy. They controlled and directed the affairs of Sparta both in peace and in war. It was a remarkable institution, which seems to have had only one counterpart in all the range of history—the Council of Ten, which ruled Venice with a high hand for several centuries, while a Doge nominally was the head of the Venetian state, and a Senate sat as the nominal legislative body, but in reality to do no more than to register the decrees of the all-powerful council.

When we come to inquire wherein consisted the legis-

lation of Lycurgus, and what were its principal features and characteristics, apart from his governmental organization and the establishment of a most rigid state socialism, which might be characterized both as extremely democratic and as extremely oligarchic—democratic in so far as it concerned the comparatively small Spartan or Heracleid minority of the people, which constituted the ruling class—oligarchic in so far as it concerned the relations of this dominant minority to the remainder of the Lacedæmonian people—we are at a loss to discover the nature and extent of his accomplishment; and there is sometimes even a temptation to believe, as some writers have asserted, that the great Spartan lawgiver was a purely mythical personage. This, however, we do not believe. His history, like that of many other famous personages, both ancient and modern, is no doubt somewhat obscured by fable and legend, but it is reasonably certain that about the year B. C. 884, there was a Spartan Lycurgus who established a code of law for Sparta, or at all events reorganized the government of that country.

Plutarch, who includes a life of Lycurgus in his famous "Biographies of Eminent Greeks and Romans," states that he never committed his laws to writing. "He was of the opinion," writes Plutarch, "that the most important points, and such as tended most directly to the public good, being imprinted by good discipline on the hearts of the young, would be sure to be retained and

would find a stronger security than would be possible by any compulsion, in the principles of action formed in them by their best lawgiver, education; and as for things of less importance, such as commercial or pecuniary contracts, and the like, the forms of which have to be changed as occasion requires, he thought it the best way to prescribe no positive or inviolable rule in such cases, willing that their manner and form should be altered according to the circumstances of the time and determination of men of sound judgment."

All this sounds very plausible. But if the gossipy biographer states truly the views of Lycurgus, and does not in fact endeavor to palm off upon us his own supposition of what Lycurgus might have thought as being the sentiment of the lawgiver himself, we are compelled either to think very poorly of the judgment of the old Spartan lawgiver, or also to conclude that his legislation was no legislation at all and extended no farther than the organization of the Spartan state, or perhaps we might more properly say its reorganization, upon a purely military basis, such as the different nations of Europe were under the institution of feudalism in the Middle Ages. For in Sparta alone of all the states of Greece the principle of feudalism prevailed and was the keystone of the social order.

If Plutarch is correct in his statement of the views of Lycurgus, it seems very clear that, notwithstanding his great reputation as a lawgiver, Lycurgus contributed

nothing to the jurisprudence of the world. He simply confirmed the usages and customs of Sparta, and they did not require confirmation. But custom, however good it may be, is no more than the law of barbarism. Civilization demands the written statute and the immutable intelligence of record. If Lycurgus did not commit his legislation to writing, it is very clear that his legislation was of no importance in the progress of civilization. He did no more than organize a socialistic military feudalism, which was ever a menace to Hellenic civilization, and a stain upon the fair fame of Hellenic culture. The only art which he induced his people to cultivate was the art of war. Under the institutions established or remodeled by him, Sparta became an intolerant military obligarchy, which never displayed patriotism that was not intense selfishness, and which never hesitated to betray the cause of Greece to the machinations of the Persian monarchs whenever it suited its own selfish purpose so to do.

The Spartan state was destitute of human sympathy; it never sought to increase the sum of human happiness; it did absolutely nothing for the advancement of human civilization. It contributed nothing to literature, or to art, or to science. It never produced a scholar, or a statesman, or even a great general, or a man eminent in any branch of human knowledge or of intellectual accomplishment. It is not even too much to say that it never produced an honest public man. Its greatest men were

Agesilaus, Lysander, and Brasidas; of whom the last named was only a versatile, and not over-scrupulous politician, and the other two, Lysander and Agesilaus, were two of the most thoroughly unprincipled scoundrels that Greece ever produced.

The Spartans fought at Salamis by the side of the Athenians, because Themistocles had contrived by a stratagem to prevent them from getting away, when they were eager to do so, and had actually resolved on flight. They gained renown by the apparently brilliant exploit of their King Leonidas and his three hundred brave companions, when at the Pass of Thermopylæ they withstood the overwhelming millions of the Persian King for nearly a whole week, and finally perished to a man. It is a pity to spoil the romance of that famous deed so celebrated in song and story; but it is a fact that there were five thousand other Greeks at Thermopylæ as brave and as efficient as the Spartans, and that after all the battle was the result of a drunken orgy. It was utterly without purpose; it accomplished no good result; its importance has been greatly overrated.

To sum up: Although the Spartans were not generally destitute of courage, that was their only virtue, if virtue it was under the circumstances; for it was as often exerted for evil as for good, more frequently in fact for evil. They were destitute of honor and of all honest principle. It would have been better for Greece and for Greek civilization, which is the same as to say the civilization of

mankind, if they had been utterly blotted out of existence before Greek civilization began. It is difficult to see what there was to be admired in them. Most of all is it difficult to see what foundation there was for the great fame of Lycurgus as a legislator. If the Spartan state was the result of the legislation of Lycurgus, it is well that nothing of that legislation has come down to us.

3. Athens.

Let us pass to the State whose glory was the true glory of Greece, renowned not alone in arms, but more so in literature, science, art, philosophy, oratory, music, political economy, in all intellectual acquirement, in all that goes to make up what is commonly known as Civilization, the state which gave more brilliant names to Greece than all the other states combined—immortal Athens.

Athens was one of the earliest states of Greece to adopt a republican form of government; and during the greater part of its national existence its republicanism was of the most thoroughly democratic type, and yet not without its checks and balances. It is said to have thrown off the incubus of monarchy about the year B. C. 1070 (or 1044), and to have established a government by Archons—the word means *rulers* or *directors*—somewhat like the Roman consuls. They held office first for life, then for a term of ten years, and finally during the classical period for only one year. The Archonate be-

came annual in the year B. C. 683, nearly 200 years before the Battle of Marathon.

In the year B. C. 624 a citizen of great probity by the name of Draco filled the position of Archon, and he filled it so wisely and well that he was re-elected to the office for eight successive years. A demand arose in his time for a revision of the laws of the state, especially in the matter of the penal code; and Draco by the unanimous voice of the people was selected for the task. He accepted the duty not without considerable reluctance. The result was the formulation of a code of law of such extreme severity that it was said by some of the Greek writers to have been written in letters of blood. It is stated, for example, that the vice of idleness was punished in it with as much severity as the crime of murder. It is related that Draco himself said in regard to it, that the smallest transgression against the law, in his opinion, deserved death, and he could find no more rigorous punishment for the more atrocious crimes; and hence that he was compelled to prescribe an equal penalty for all.

Of course, in view of its extreme severity, the Draconian Code could not last long. It is surprising that it remained in effect even for the period of thirty years, during which its nominal existence is said to have lasted. But at the end of thirty years it was superseded by a scheme of legislation more reasonable and more in accordance with the requirements of our human nature. The sole legacy of itself which it left to after times was

the epithet *Draconian* applied to any legislation of unusual severity—generally legislation in regard to crimes. But it remains a palpable illustration of the futility of undue harshness in legislation. The legislation of Draco, however, was much more humane and infinitely less brutal than the penal code of England for the two centuries and upwards from the reign of Henry VIII to about the year 1800, during which the penal laws of England enumerated over two hundred criminal offenses punishable with death, and the death penalty, often accompanied with the most horrid barbarities, as well as with confiscation of property.

The true legislator of Athens, probably the greatest and wisest legislator of all time, if we except Moses, arose when in the year B. C. 594, about a hundred years before the Battle of Marathon, Solen became Archon of Athens and soon afterwards was chosen by his appreciative countrymen to revise the work of Draco, and to prepare a further and more suitable code of law for the Athenian commonwealth. In early life Solon had been engaged in mercantile pursuits, in which he had amassed a considerable fortune. Afterwards he devoted himself to the study of philosophy and political economy, and travelled extensively in Greece, Crete, Asia Minor, Cyprus, and Egypt. By his integrity, his consummate wisdom, his great intellectual acquirements, and his extraordinary experience in affairs, he was eminently well qualified for the performance of the task which he un-

dertook at the solicitation of his fellow-citizens; and the result of his labors was such as to justify the propriety of their choice for all time. No legislator ever enjoyed a greater reputation in ancient times, and none more deserved it than Solon; and no one has ever more influenced the current of legal thought through all the subsequent ages, unless indeed we have to except, as already stated, the great lawgiver of Israel. He was ranked among the "Seven Wise Men of Greece," and was the most famous of them all. Each of them, it is said, had some remarkable aphorism attributed to him: that of Solon was *Know thyself*—a truly Christian precept, by the observance of which all humanity could wisely profit. It remains to be added that, when he had finished and promulgated his code, he bound his fellow-citizens by a solemn oath to observe it for a hundred years, and then went into voluntary exile to die in a foreign land, in order to leave his people entirely free from the presence of his personal influence to make the experiment of compliance with his laws. Notwithstanding that the usurpation of Pisistratus intervened during this period of one hundred years, the Code of Solon maintained its influence, and remained the law of the Athenian commonwealth, with comparatively little change, for the whole time of the national existence. And not only did the Code of Solon remain the law of Athens, but it was also accepted by most of the other Grecian states, especially those of the Ionian branch of the Hellenes, as the

basis of their jurisprudence. It likewise exercised a profound influence on the subsequent legislation of Rome.

Plutarch, in his Life of Solon, states that the great lawgiver was once asked whether the laws which he had given to the Athenians were the best that could be devised; and that his answer was that they were the best which they would accept. And the statement, if true, was evidence of Solon's consummate wisdom in statesmanship; for the true excellence of any system of law does not consist so much in their intrinsic quality as in their accommodation to the character and the circumstances of the people for whom they are enacted. It is worthy of note that a remark almost identical in terms and under analogous circumstances was made by the nearest counterpart of the Athenian Solon in modern times, our own Benjamin Franklin, on the occasion of the formulation of our Federal Constitution.

The legislation of Solon affected the organization of every department of the Athenian state. He reformed the courts and the magistracy, and organized the people into four appropriate classes for the political management of the affairs of the commonwealth. These classes were based mainly upon the greater or less ownership of property and their interest in the state; but there was no system of caste to keep them apart, and a person might readily pass, by the acquisition of the required qualification or the loss of it, from one class to another. To the first, second, and third class was restricted the right to

hold office; but the fourth class, which included the poorer citizens, who were of course the most numerous, and whom it was the special purpose of Solon's legislation to protect against oppression, had an equal voice in the public assemblies of the people with the other three classes; and consequently in course of time it came to wield the chief power in the state.

All the tribes convened together in general assembly had the final determination of all matters, legislative, executive, and judicial; and it was this meeting in general assembly that made Athens the great democracy which it was in the days of its historic renown. But the democracy was not, as already stated, without its checks and balances. There was a Senate, composed at first of 400, and afterwards of 500 persons, selected by lot from a larger number of persons designated by the presidents of the several tribes; for each tribe was organized with its own president. This Senate was chosen every year. It was its duty to pass in the first instance upon all measures proposed to be submitted to the General Assembly of the people; and it was deemed irregular to bring anything before that Assembly which had not been referred to it by the Senate. This provision operated substantially like our modern device of two legislative chambers.

The Archonate also was remodeled by Solon. As we have seen, this had existed for five hundred years before his time, with a single Archon, holding his office

first for life, then for ten years, and ultimately for one year only. Solon provided for nine Archons to be elected annually, of whom the first or chief was usually known as The Archon, and who was both an executive and a judicial officer. He was the chief executive; and his judicial functions corresponded somewhat to those of our courts of probate, although broader in their scope. The second, known as the King Archon, had cognizance of ecclesiastical and religious affairs; and it was his duty also to take cognizance of all accusations of murder and to bring them before the court of the Areopagus. The third Archon, known as the Polemarch, or War-Leader, originally had command of the army in time of war, and afterwards had the care of all aliens and sojourners in Athens, and exercised the same judicial functions in regard to them which the first Archon did in regard to the affairs of citizens. It was customary for each of these three magistrates to appoint two assessors, as they were called, and who were persons of experience and gravity, to sit with them in the performance of their judicial duties. The other six Archons acted as a kind of Council, both for executive and judicial matters; and it was one of their special functions to hear and determine all disputes between citizens and aliens.

Most noted of all the institutions of Athens was the great court of the Areopagus, so called because it sat on the Hill of Mars, Areio Pagos, situated to the west of the famous Acropolis, whereon stood the Parthenon or Tem-

ple of Minerva. Its establishment was not, it seems, due to Solon; it appears to have antedated Solon by as much as 700 years. Its origin must be referred to the earliest days of the existence of Athens. There is a statement in the mythology that Mars himself was once arraigned before it at the instance of the Goddess Minerva. It was, however, reformed, and wholly remodeled by Solon; and for this reason its institution was sometimes attributed to him. It was a court in which the members held their offices for life. It seems to have been recruited from year to year by the accession to it of the nine Archons after the conclusion of their term of office, provided they accounted satisfactorily to the General Assembly for the discharge of the duties of the Archonate. The number is variously stated by different writers as nine, thirty-one, fifty-one, and even more. The fact seems to be that it varied from year to year, as would necessarily be the result of the life tenure and the accession of the retiring Archons. The tribunal which condemned Socrates for the alleged crime of impiety, according to Plutarch, registered 281 votes against him, without reference to the votes in his favor. In one ancient document the number of judges is stated as being three hundred. Probably during the time of its greatest efficiency, which was likewise the period of the greatest power and renown of Athens, from the time of Solon to that of Pericles, some of the smaller numbers would more correctly represent the membership of the court. But no doubt the power

which it had of subdividing itself into sections, as circumstances may have required, so that each section might sit as the whole Court, has led to some confusion in this regard as to the number of judges composing the Court.

A singular practice of the Court of the Areopagus was that it always sat in the open air and at night. For the former custom some vague religious reason is usually given; for the latter the reason assigned is that the darkness conduced to the absence of bias on the part of the Court, such as might be superinduced by a close view of the parties. That this was not an entirely unreasonable precaution appears very plainly from the practice often pursued in our own courts of conspicuously parading the parties in the presence of the jury in order to excite sympathy or foment prejudice. Solon seems to have thought that he could not guard too sedulously against the practice. But we are told how his precautions were once set at naught by a beautiful woman famous in Grecian story, but not for virtue, who exhibited herself suddenly before the Court in which she was accused, and gained a judgment which should not have been rendered.

Great was the renown of the High Court of the Areopagus throughout all the States of Greece, and even far beyond the limits of the Hellenic Race. Many foreign states are said to have voluntarily submitted their controversies to its arbitrament. The wisdom, the justice, and the impartiality of its judgments were universally recognized; and for many ages, and even long after the

glory and the power of Athens had departed, far down into the Roman times, it maintained its reputation unimpaired. Its glory had not departed even when St. Paul appeared before it in his famous journey through Greece, and made a convert of one of its members, Dionysius, who is known to us by the appellation Dionysius Areopagita.

There were other courts in Athens besides that of the Areopagus. Ten of them are usually enumerated. They were the courts of ordinary jurisdiction, while the High Court of the Areopagus was one of supervising power and authority. Time is wanting to us to set forth their functions in detail; and probably no good purpose would be subserved by an elaborate examination of the Athenian judicial system. More useful would be some account of the nature and character of the law which these tribunals administered and which was established by Solon, so far as it has been transmitted to us. For we have not the legislation of Solon in its entirety; what we have is of a rather fragmentary character, although sufficient to give us a satisfactory idea of its general scope and character.

Solon committed his legislation to writing, and caused it to be engraved upon tablets of brass hung up in the *agora* or market-place for the public information. For the greater facility of its being committed to memory in an age when writing, although general, was very far from being universal, it was written in verse in which respect

the legislation of Solon resembled that of Manu in Hindustan. The tablets of brass have long since perished; and their contents, if they were ever transcribed, have not been preserved to us. We have about 150 elegiac verses saved to us from the wreck of the ancient literature, which are stated to have been the work of Solon. They contain moral precepts and directions for the regulation of human life; but whether these entered into his Code of Law or constituted a kind of preamble to it, it is impossible now to ascertain. At all events, the Code of Solon in its entirety has not come down to us, although the frequent references to it in ancient writers which have been preserved to us, have enabled modern investigators to reconstruct his system to a very considerable extent. A difficulty, however, in the way of an accurate acquaintance with the work of Solon is presented by the fact that many enactments of after ages, when shown to have been wise and beneficial, were frequently attributed to Solon, as indeed were many previously existing provisions of law which were adopted by him and thereby perpetuated. Just the same thing we know happened in England when, under the French Kings of Plantagenet Race, demand was often made for the restoration of certain so-called laws of Edward the Confessor, although no such laws had ever existed under Edward the Confessor.

Besides the organization of the Athenian system of government, to which reference has already been briefly

made, the Code of Solon provides liberally for the admission of friendly aliens to the right of Athenian citizenship, as well as for the right of every Athenian to expatriate himself, if he so thought proper—a more noble and liberal theory of citizenship than obtained elsewhere among the nations of the ancient world, or even among those of modern times. At the same time he sought to guard against a too great freedom of intermarriage between Athenians and aliens by interposing various disabilities upon the practice—a wise provision which would not be out of place in our own day, when the purity of our republican institutions is being often corrupted by intermarriage between American women and the profligate and worthless scions of European aristocracy.

In respect of the domestic relations there was not much left for Solon to do beyond the formulation of previously existing law. For the first time in the history of jurisprudence, so far as we are advised, the mandate appears in the Code of Solon—"Let no man have more than one wife." But we are told by the historians that the mandate was a thousand years older than Solon, and that it originated with Cecrops, the more or less legendary founder of the State, whose era is usually given as the year B. C. 1556. In fact, it would seem that monogamy, the law of one husband to one wife and one wife to one husband, was the immemorial usage of the Aryan or Japhetic Race, in sharp contrast with the polygamy universally practiced by the Hamite and Semitic nations, by

the Egyptians, Phœnicians, Assyrians, Babylonians, and even the Israelites. The East Aryans, the Medo-Persians and Hindus, seem to have in course of time fallen away from the principle, corrupted no doubt by intercourse with the surrounding Semites and Hamites; but the Western Aryans, the Greek, Romans, Celts, Teutons, and Sclavonians, notwithstanding instances of individual infamy, were from the very earliest days and always have remained faithful to the law of monogamy. It is sufficiently apparent from the pages of Homer that it was the law of the old Achæan commonwealths of the heroic ages, as it was the inexorable rule of classical Greece and classical Rome. And it may be remarked that the two most powerful factors in our modern civilization are the monotheism of Israel and the monogamy of Greece and Rome.

It was a grave defect, however, in the Code of Solon, so far as it bore upon the domestic relations, that, while violations of the moral law, such as adultery and fornication, were severely punished, yet concubinage was not prohibited, and harlotry was encouraged rather than discountenanced, and divorce was allowed and was made as easy as it is to-day in South Dakota. The marriage, too, of near relatives was encouraged, instead of being prohibited, as with us; and there are some well authenticated instances of the marriage of brothers and sisters, as in Egypt both under the early Pharaohs and the Greco-Macedonian Dynasty of the Ptolemies.

Under the Athenian laws of inheritance formulated by Solon, lands descended equally to all male children, and to females only in default of male offspring. Adoption of children was authorized by law; and adopted children inherited from those who had adopted them, and took equally with other children, when there were others. Wills of real estate were allowed only when there were no children to inherit it.

Ample provision was made in the laws of Solon for the care of orphans and the appointment of guardians for them. It was one of his enactments that no one should be appointed a guardian who would be entitled to take the estate of the ward upon the death of the latter, the intention being to guard against the temptation to put the ward out of the way for the purpose of taking his inheritance.

There was a limitation upon the amount of land which a person might hold, and a prohibition of the pursuit of more than one trade by any one person. The only provision in regard to usury would seem to have been that the interest on money lent, when once fixed, should not thereafter be increased and that no pledges or sureties should be held for more than one year, and should be faithfully restored or honestly disposed of at the end of that time.

The criminal code of Solon was sufficiently reasonable and humane. Murder, treason, highway robbery, arson, burglary, kidnapping, bribery, and some few other

crimes, were punishable with death; all other offenses, with fine or imprisonment, or both, as with us. Defamation either of the living or the dead was a penal offense, not merely a civil injury, as with us. The punishment for theft bore a remarkable resemblance to that provided in the Mosaic Code. Both were probably borrowed from the penal code of Egypt. It was that the thief should forfeit twice the value of the article stolen to the injured person, and the same amount to the public treasury; and if he could not pay, as of course was very frequently the case, the courts should award an appropriate punishment. Idleness was a crime under the Code of Solon; but the provision was not original with him. It was contained also in the laws of Draco, and may have been even earlier than Draco. There was no place in the civil polity of Athens for the tramp, the vagrant, or the idler. Those who had no occupation were required to work for the public.

A prominent feature of the legislation of Solon, yet one which it had in common with the legislation of various other nations, both ancient and modern, England among them, as well as some of our American states and colonies to a greater or less extent, was the existence in it of sumptuary laws—that is, laws to regulate the conduct, habits, and personal expenses of individuals. Our liquor laws are to a certain extent sumptuary laws. Solon sought to regulate and limit the expense of entertainments and funerals, and even women's traveling ex-

penses. Women in ancient times must have given much trouble with their trunks and hand-boxes, and other paraphernalia, to have induced the wise Solon to insert this provision in his Code:

"Women are forbidden to travel with more than three gowns, or more meat and drink than they can purchase for an obolus: neither shall they carry with them more than a hand-basket, or go out anywhere by night but in a chariot, with a lamp or torch carried before it."

The provision may have been satisfactory against traveling at night except in carriages or chariots, with lights carried before them; but the great legislator was certainly deficient in his knowledge of female human nature, if he supposed that his statute would prevent women from travelling with more baggage than one hand-basket, unless it was to go on a picnic.

Common sense would certainly sanction the limitation which he made upon the number of guests that should be invited to any one entertainment; but the wisdom of inserting such a provision in the laws of a State may well be doubted. Possibly a similar criticism might apply to his enactment that at banquets only *mixed* wines should be drunk, the pure being reserved until after the feast, when perhaps the guests themselves would be so mixed that they could not distinguish the wine of Chios from the wine of Cyprus—or, as we would say, Champagne from Burgundy. But it does show on the part of Solon con-

siderable knowledge of the nature of the chronic politician, who no doubt infested Athens as he infests America, when he provided that no man should hold two offices at the same time. We have been compelled to provide that no man should draw two salaries at the same time. The evil sought to be reached is the same.

Those who are familiar with the classical history of Greece will recall the fact of the existence in Athens of a peculiar law directed against the inordinate ambition of too powerful politicians—the law of ostracism, whereby any Athenian, who had become obnoxious to his fellow-citizens for any cause, might, without the commission of any offense, whatever against the State, be required to go into exile for a period not to exceed ten years, provided that there was a concurrence of six thousand voters to that effect. It will be remembered that Themistocles, Aristides, Cimon, and some others of the best and greatest statesmen of Athens were driven into exile under the operation of this law, which derived its name from the *ostrakoi* or shells, which were used for expressing the vote. This law was not found in the Code of Solon. It was the device of a statesman by the name of Kleisthenes, the most prominent person in the movement which led to the expulsion of the Pisistratidæ, who had usurped supreme power in Athens from B. C. 559 to B. C. 508. It would seem to be a whimsical, oppressive, and unjust enactment; yet upon careful consideration it does not appear to be as bad as it seems at first sight. There are

times and circumstances in which it might well subserve a useful purpose.

The course of procedure established by Solon in connection with the administration of justice comprised an elaborate system of forms of action. These the Archons were authorized to formulate and modify from time to time as occasion required. For the peace of society and the quieting of controversy the great legislator did not forget to provide periods of limitation for the different actions, not unlike our own. A limitation of five years would seem to have been the most general. All persons summoned as witnesses were compellable to appear and testify. Disqualification on account of interest rendered a witness incompetent; and perjury was severely punished.

The Laws of Solon were somewhat modified at the instance of Aristides about a hundred years after the death of the lawgiver; and subsequently they were yet more modified through the influence of the famous Pericles in the period about B. C. 450-429. The changes effected by Aristides were perhaps beneficial; whether those caused by Pericles were so, may perhaps be doubted. Pericles was not only the greatest and ablest statesman whom Athens ever produced, but also probably the greatest whom the world has ever known. Only Julius Cæsar among the Romans can be compared with him. But he was a man of extraordinary ambition and not over-scrupulous in the methods to which he resorted for

its gratification. It would seem that, notwithstanding the extraordinary power wielded by him, he never succeeded in being elected to the Archonate; and for that reason he bore a grudge against the Court of the Areopagus, from which he was debarred, and whose power and jurisdiction he sought to curtail. How like is human nature in all ages! We have had similar suggestions, for not entirely dissimilar reasons, for the curtailment of the power of the Federal Judiciary in our own country.

The Laws of Solon remained the basis of the Athenian institutions and of all Athenian legislation down to the latest day of the national existence of Athens. Their spirit was adopted in the Roman laws; and they have profoundly influenced the jurisprudence of all subsequent ages. In all the annals of law there is no greater name than that of Solon.

It may be remarked here that, following upon the lines laid down by Solon, another great Athenian, the famous philosopher Plato, who contests with Aristotle the title of greatest of philosophers, wrote, in the description of his Ideal Republic, one of the best commentaries extant on political economy and jurisprudence.

4. Other Greek States.

Athens was not the only Hellenic state that became noted for its legislation. With the Hellenes generally the study of philosophy, political economy, and jurisprudence became a passion. They were all intensely devoted

to the principles of civil liberty, unless we except therefrom the Spartans, who were never devoted to anything but their own selfish interests; and throughout all the Greek cities upon all the shores of the Aegean, the Euxine, and the Mediterranean seas, the energy of the Hellenic mind was devoted to the development of law and their common Hellenic civilization upon parallel lines. In Miletus, Ephesus, Mitylene, Samos, Cyrene, Syracuse, Massilia, and perhaps most of all in the flourishing cities of Magna Græcia—Greater Greece, as it was called—the region of Southern Italy, the magnificent country around the Gulf of Tarentum, wherein were contained the commonwealths of Metapontum, Heraclea, Tarentum, Sybaris, Crotona, and others scarcely less noted, the active, restless, energetic spirit of Hellenism raised up rivals to Athens and Sparta; and their inhabitants were as eager as those of Athens to develop Hellenic art, science, and philosophy. Many of the greatest names in Hellenic story were borne by citizens of these little commonwealths.

Then, by the conquests of Alexander the Great, while Athens and Sparta and Thebes and Corinth declined, Egypt and Syria yielded to the Hellenic civilization, and new centres of development arose at Alexandria and Antioch; and for a time these two great cities eclipsed even the glory of Athens in philosophy, science, and literature.

Every Hellenic city was practically an independent republic, and every Hellenic city, while greatly yielding

to the sovereign influence of the Laws of Solon, had its own institutions and its own system of jurisprudence. In many of them there were lawgivers of fame and renown, such as Pythagoras at Crotona in Magna Græcia, Charondas at Catania and Rhegium in the same region, Diocles at Syracuse in Sicily, and Zamolxis in distant Scythia, on the shores of the Euxine, or Black Sea, besides others of less note. Of these there is only one to whom it is proper to refer here at any length.

There are not many names more noted in the history of the human intellect than that of Pythagoras of Samos, whose epoch, although uncertain both as to its beginning and as to its termination—for neither the year of his birth nor that of his death has been definitely ascertained—may be fairly presumed to have extended from about the year B. C. 567 to about the year B. C. 497. He belonged, therefore, to the generation immediately following that of Solon and immediately preceding that which fought the Battles of Marathon and Salamis. He was a native of the Island of Samos, in the Aegean Sea; but he spent very little of his life in his native land, which, during considerable part of his time, was under the government of Polycrates, who, although a tyrant, in the Greek sense of that word, was the personal friend of the philosopher. He traveled extensively in Greece and Egypt, and it is believed also in various countries of Asia, possibly including Persia and Hindustan. By Polycrates he was commended to Amasis, King of Egypt,

which country he was most eager to visit in order to acquire for himself, if possible, the wisdom and the learning of its mysterious priesthood.

Pythagoras, it is stated, remained in Egypt for 22 years. He visited the cities of Heliopolis, Memphis, and Thebes. In the latter he seems to have succeeded in ingratiating himself with the all-powerful priesthood, and to have been, in part at least, initiated into their mysteries. He is supposed to have been in Egypt at the time of its conquest and devastation by the Persian conquerer Cambyses (B. C. 526), and afterwards to have been taken or to have gone in his train to Asia. He is presumed to have found his way to Babylon, and there to have associated with the ancient sages of Chaldea, and with such of the priests and elders of Israel as yet remained in the great city on the Euphrates. Further surmise takes him still farther into Asia, to the banks of the Indus and the Ganges, and to association with the Brahmins of Hindustan, with whose doctrines and practices he certainly showed some acquaintance. But the supposed travels of Pythagoras are all mere matter of conjecture; he was himself in after life very reticent in regard to them.

Returning home from his travels, Pythagoras sojourned for a time in his native island of Samos, yet under the government of Polycrates; but he did not tarry long there. He desired a more congenial soil for a trial of his economic and philosophical theories. Restless and

ardent spirits among the Hellenes then looked to the West, somewhat as we do to-day, as an appropriate place for the establishment of new standards of life and new theories of government; and their Hesperia, or Land of the West, was Italy and Sicily. Sicily and Magna Græcia had already received numerous Greek colonies, and Greek adventurers were constantly flocking to their shores. Pythagoras looked on Magna Græcia as his Land of Promise. Passing through Crete and the Peloponnesus, in the latter of which he assisted at the Olympian Games, he finally found his way to the City of Crotona, on the Gulf of Tarentum, where he was so well received that he resolved to make the place his permanent habitation. There he established his school of philosophy, gathered scholars and adherents around him, was entrusted by the citizens with the work of remodeling their institutions, established a philosophical republic on combined aristocratic and socialistic lines, and died there at an advanced age about the year B. C. 491. But the institutions which he established did not long survive him; they were impracticable. Many of his theories, however, had a wonderful fascination for after ages; and this fascination, together with his many virtues, long kept the name of Pythagoras alive in the cities of Greece and Italy, and has commended him even to the modern world as one of the greatest philosophers of antiquity.

Pythagoras was a great astronomer and mathematician as well as philosopher. He it was who gave to the

world the demonstration of the proposition which stands as the Forty-Seventh Theorem in the first book of Euclid's Elements of Geometry, that the square of the hypothenuse of a right-angled triangle is equal to the sum of the squares of the other two sides of the triangle, a proposition without which there could scarcely have been a science of mathematics, or of geometry, or of astronomy. He proclaimed that the sun, and not the earth, was the centre of what we now call the Solar System, therein anticipating by about two thousand years the great discovery of Copernicus, although his theory, which was probably derived from the astronomers of Babylon or Hindustan, obtained no credence at the time or afterwards in the Western World, and gave way to what is known as the Ptolemaic System of Astronomy.

Of the philosophy and philosophico-religious theories of Pythagoras we have no more than fragmentary knowledge. For if he wrote anything himself, his writings have not come down to us; and his disciples, imbued with his own mystical views, do not seem to have been eager to communicate them to the world. The cardinal principle of his philosophy was the supposed unity of mind and matter, the gradual elimination of matter as the grosser part, and the final absorption of the soul or spirit into the universal spirit. This theory leads to arrant pantheism. It is the theory of Buddhism and the Buddhistic Nirvana, as well as that of the Vedanta school of philosophy among the Brahmins. With this he combined

the theory of metempsychosis, or the transmigration of souls from one body into another in the course either of purification for the ultimate absorption into divinity, or of ultimate perdition and destruction. In supposed furtherance of this theory he asserted that he distinctly remembered that his own soul had previously been impersonated in different other individuals whom he named, and of whom one was Euphorbus, a Trojan, who perished during the siege of Troy. It was these doctrines of his, savoring so much of Orientalism, and especially of the wild speculations of Hindustan, that superinduced the belief that Pythagoras had learned his theories by personal contact with the Hindu priesthood.

There is much of mystery about the teaching, as well as about the conduct, of Pythagoras, due in great measure to himself. For he frequently talked and taught in symbols. His language was often purposely enigmatical. He surrounded himself with mystery. He frequently withdrew himself from the popular gaze, and suddenly re-appeared again under circumstances calculated to excite surprise and amazement. And all this he did with the view of impressing his followers and the people with the belief that he was possessed of superhuman powers. With all his virtues and his confessedly high character, there is good ground for conjecture that he learned something more than their philosophy and their wisdom from the priests of the Nile and the Euphrates, and from the Buddhists and Brahmans of Hindustan; that he learned

their quackery and their charlatanism, and became an adept in it, and did not hesitate to resort to it whenever it suited his purpose. The modern world would think more highly of Pythagoras if there were not always a suspicion of imposture attached to his conduct.

As we have said, Pythagoras established at Crotona an aristocratic socialistic republic, and his legislation for his little commonwealth had great reputation in the ancient world as constituting the most successful attempt to give practical operation to the doctrines of socialism. These doctrines have been preached again in modern times by the Frenchmen, Saint Simon and Fourier; and there are many persons in our country who profess to believe that in the establishment of state socialism or a socialistic state will be found the remedy for many of the evils with which society is afflicted. But the experiment of Pythagoras did not long survive him; and the result evidently was not such as to justify its repetition elsewhere either in the ancient or the modern world, except in one notable instance which stands alone in the history of mankind, the organization three centuries ago of the native races of Paraguay, in South America, into a socialistic republic under the guidance of the Jesuits, which certainly was quite successful.

We are not advised as to the details of the legislation enacted by the Samian philosopher for the Republic of Crotona; and we have no reason to believe that it exerted any great influence on the general development of

law either in the Grecian states or elsewhere. But though his singular experiment at Crotona was barren of useful result, unless it be that it may be served as a deterrent to the repetition of the experiment, it is not proper to omit mention of it in any account of the history of jurisprudence and political economy.

CHAPTER VI

DEVELOPMENT OF THE LAW IN ROME

Let us proceed now to the people who in the development of law stand pre-eminent among all the nations in all the annals of time, and who have devised the most perfect legal system which the world has ever known. I refer, of course, to the Romans, the conquerors of the world not so much by the power of their arms as by the immortal force of their great jurisprudence.

The story of Rome in its general outlines is no doubt well-known to you. The origin of the great city, like most origins, is enveloped in myth and fable; and the first 360 years of its so-called history is so interwoven with legends, that it is difficult, if not impossible, to ascertain how much is the substratum of truth, and how great the extent of superimposed embellishment. From the statements, however, of its two most noted historians, as well as of other most trustworthy writers, we may gleam sufficient facts for the purpose of our present inquiry. Its own Livy, and the learned Greek Dionysius of Halicarnassus, the worthy fellow-countryman of Herodotus, both of whom flourished in the age of Augustus,

and both of whom had access to records and writings now lost to us, have written the history of Rome, with the utmost impartiality and an earnest desire to elucidate the truth. They give us the myth and the legend, as well as the authenticated facts; and the sincerity of both narratives is beyond question. Cicero and Varro also have given us interesting glimpses into the early history of Rome; and their references to Roman institutions and the Roman laws are most valuable to us.

It would appear that about the year B. C. 753 the foundations of Rome were laid by an adventurer, who is known to us by the name of Romulus. The name may have been a fictitious one; but it is his true name to us, since we know of no other. We have called him an adventurer; he was probably such. He is supposed to have come from the town of Alba Langa, on the Alban Hills, some fifteen miles or more to the southeast of Rome; but there is some reason to suspect that he may in fact have been a Greek from some of the Greek cities of the Campanian coast or of Magna Græcia, on the south shore of Italy. Very differently from ourselves and our English cousins, who generally seek to pass off for gentlemen the cut-throats and pirates who swarmed from Normandy with William the Conqueror, when that enterprising ruffian subjugated England, and worse still as a heroic race the bands of blood-thirsty savages, known to us by the arbitrary name of Anglo-Saxons, who came from the shores of North Germany with Hengist and Horsa, to

ravage and plunder and conquer Britain, the historians of Rome, and the Romans themselves, did not hesitate to assert that their ancestors, the first founders of their city, were principally fugitives from justice, thieves, robbers, and outlaws from the neighboring regions, who found the atmosphere of their own previous places of residence uncongenial in view of the exigencies of their criminal laws. In fact, the Romans themselves seem to have rather exaggerated than extenuated the absence of civic virtue in the progenitors of their race. The truth would seem to be that Rome was originally a border settlement on the confines of the territories of three ancient Italian states, Latium, Etruria, and Sabinia; that three of the seven hills on which the subsequent great city was built had been long occupied, centuries perhaps before the reputed era of Romulus, by three little villages, one of Latin, one of Etrurian, and one of Sabine origin; that the adventurer, known in legend by the name of Romulus, combined the three villages into one town or municipality; and that he offered inducements to other adventurers and strenuous men like himself to settle in the place. Many of these new-comers, and no doubt some of the older residents too, were men who had left their previous abiding places for the good of their country, men perhaps with many aliases and little principle, men with a past who preferred to leave that past behind them—just such men, in fact, as by their restless energy and enterprise, in the days now happily past, built up some of our own

frontier settlements, and became the founders of thriving cities and even of great commonwealths.

Three great periods are noted in the history of Rome —the monarchical, lasting 244 years, from B. C. 753 to B. C. 509; the republican, lasting 478 years, which was nearly double the monarchical, or from B. C. 509 to B. C. 31; and the imperial, which was for 507 years, a little longer than the republican, from B. C. 31 to A. D. 476. The second of these, the republican period, was that of true Roman greatness and of true Roman development in all that made Rome great. The first was the period of infancy and formation; the third of decay and downfall.

The monarchical period is in history usually filled in with the names of seven kings—six besides Romulus—who, singularly enough, were, with some degree of regularity, alternately of Latin, Sabine, and Etrurian race. There were probably many more than seven; but these seven must now stand for all. We refer to them here, because two of them were noted lawgivers, who sought with much industry to fashion and formulate the institutions of the growing city—for city it was, rather than a state, and such it practically remained during the whole monarchical period and for more than a century afterwards. It was merely a municipality, with a small surrounding territory, not much larger than the District of Columbia. The cities of Greece were all of the same character; and the development of Rome was practically

not different from that of the Grecian cities, which were all independent republics.

Numa, the second King, and set down in the legends as the immediate successor of Romulus by election, was of Sabine race, and was the first and original legislator of Rome. He was called upon to organize what Romulus had aggregated. There is a pretty story to which the historian Livy has not hesitated to give currency, without vouching for its truth, that Numa derived his inspiration from converse with the nymph Egeria, one of those lovely spirits, creation of classical fancy, not human and yet not wholly divine, and that he often retired to confer with her in her home in some sequestered vale among the Sabine Hills. We are not required to believe the story, notwithstanding that it may be made more credible, if we regard Egeria, who is never elsewhere mentioned in the classical mythology, as being more of human mold than other nymphs of the age of fable. It is pleasant to think that a fascinating woman may have contributed largely to the building of the Roman State; for woman had much to do with its downfall. But history or legend does not tell us what laws the fair Egeria inspired, nor indeed what laws Numa established. We are only told that they were wise, and that Numa acted with consummate wisdom in formulating the institutions of the infant city. He bore the same relation to after ages in Rome that Alfred the Great and Edward the Confessor did to the days of the Normans

and Plantagenets in England; and his laws were as much in demand in Roman times as were those of Edward the Confessor under the Norman Kings of England.

The sixth king Servius Tullius was also quite active as a lawgiver, and in shaping the institutions of the city; and the form which he gave to these institutions would seem to have been perpetuated for many centuries. The two Tarquins, the fifth and seventh in the ordinary list of the Kings of Rome, also left a deep impression on the constitution of the Roman state. But to inquire specifically what these several rulers did in the way of legislation, would be a problem rather for the antiquarian than for the student of law, even if we could ascertain it to our satisfaction, which is exceedingly doubtful. For the present it will suffice for us to know that, during the monarchical period of the existence of the Roman state, the peculiar organization of the civil polity of Rome became crystallized into the permanent form which it seems substantially to have retained for many ages.

From the earliest days of Rome we find a distinction of two classes recognized, the patricians and the plebeians. How far this distinction was due to conquest, is not quite apparent. Livy intimates that the plebeians constituted the part of the population which was removed to Rome from some of the towns of Latium that had been conquered by Ancus Martius, one of the warrior kings. At all events, the fact is that the patricians comprised what may be called "the first families," that is, the early set-

tlers of Rome; and that the subsequent accessions received the name of plebeians. The two classes, it may be well to remember, did not receive their several appellations in consequence of any difference of the social order in the way of birth and education, as might be supposed. On the contrary, our meanings for the terms *patrician* and *plebian* are the result of the Roman classification. In other words, the classification led to the subsequent meanings, not the significance of the words, or the qualifications for which the words stood, to the classification. And this is a very important distinction to be borne in mind in our consideration of Roman institutions and the Roman History.

The patricians were the earlier settlers and their descendants. They claimed for themselves rights and priviliges, which they did not allow to the more recent accessions to the population, the plebeians. Both were freemen; but the patricians constituted themselves into a kind of aristocracy which sought to control the state, and did in fact generally succeed in controlling its policy. King Servius Tullius, the sixth monarch, who has already been mentioned, would seem to have effected a very radical change in the social and governmental organization of the city in his time by enlarging the power of the plebeians and giving them a greater voice than they had previously possessed in the government of the state. But, notwithstanding this, the line between the two classes was always sharply drawn; it was to some extent

analogous to that between the aristocracy and the commonalty in England. And the distinction continued throughout all the Republican Period, and even into the times of the Empire, when it was finally lost; and it often brought the classes to the verge of civil war with each other. In fact, the distinction between patricians and plebeians was felt in the civil wars which led to the overthrow of the Roman Republic by Julius and Augustus Cæsar. For the patricians, as partisans of the existing social order, generally ranged themselves with Pompey first, and with Brutus and Cassius afterwards; while Julius Cæsar, and his even more plausible nephew Octavian or Augustus, attracted to themselves the needy and impecunious plebeians. But, during the greater part of the Republican Period of 478 years, and especially during the latter half of this Period, the patricians and plebeians lived together in comparative amity, and participated with each other in the management of the affairs of the state, although never perhaps upon exactly equal terms. During the early ages the lines between the two were so sharply drawn that marriage between them was prohibited. This prohibition was subsequently removed; but there always remained the social ban, such as it exists even to-day in many communities of the modern world.

The Senate may be said to have been the ordinary governing body of the Roman State. It was always selected from the Patricians; and its institution dates back to the very earliest days of the existence of the city. It was

composed at first of three hundred persons, one hundred from each one of the original three tribes. The number is believed to have been increased to four hundred by Servius Tullius; and later it seems to have varied very considerably at different times. It constituted the Common Council of ancient Rome; although as Rome, like the Greek cities, was not only a city, but likewise a state, it would not be proper to say that the powers of the Roman Senate, even in its earliest days, were no more than those of a modern municipal council. The early Roman Senate, in the monarchical period, rather resembled the councils, which, in our own colonial days, aided the governors in several of the colonies in the administration of public affairs.

It is a common mistake to suppose that the Roman Senate was the Legislative Assembly of the Roman commonwealth. It is true that it legislated for the provinces outside of Italy, when Rome became great and powerful and acquired territory; and that, even in Italy itself, outside of the city of Rome and the immediately adjoining territory, it had large legislative authority. But in the city itself and its appurtenant municipal territory, it never had legislative authority in the full sense of the term. Its duties were rather executive than legislative. The power of legislation properly so called was vested in the General Assembly of the people; and in these the senators participated simply as other citizens. But there were two kinds of General Assembly; and in this regard,

as well as in some others, the constitution of the Roman state was singularly complex, and indeed to our modern understanding somewhat obscure. There were the Comitia Curiata and the Comitia Centuriata.

The Comitia Curiata was the original Roman Assembly, composed of the first *populus* or people of Rome, the patricians, who were divided into thirty *curiae,* or tribes, ten for each of the three original grand divisions. Voting in the Comitia Curiata, or Tribal Assembly, as we may perhaps call it, was by *curiae* or tribes, as units, each tribe having one vote, and that vote determined by a majority of the votes of the individual members of the *curia.* The franchise of the Comitia Curiata, as indicated, was restricted to the patricians. The plebeians had no voice in it.

The *Comitia Centuriata,* in which the plebeians had a voice, was established, it is said, by King Servius Tullius, early reformer of the Roman state, and who, by reason of his own rather obscure birth and for other considerations, was disposed to protect the *plebs* or plebeians, and to secure political rights for them. The term *Comitia Centuriata* has scarcely a corresponding word in English. The literal meaning is the Assembly of the Centuries. For the purpose of its establishment the whole people of Rome, the populus and the plebs, the patricians and the plebeians alike, were divided, on the basis of the amount of property owned by them, into five classes, according to Livy, or into six classes, according to Diony-

sius of Halicarnassus, which again were subdivided into 193 centuries, or groups of one hundred each, *centum* meaning one hundred, so called because originally, as it is stated, each group was actually composed of one hundred persons. Possibly this represented the actual population of Rome at the time the institution was established. Afterwards, of course, although the name was always retained, the membership of the several groups or centuries, so far as number was concerned, necessarily became indefinite. Every Roman citizen, patrician and plebeian alike, was entitled to participate in the Comitia Centuriata. The voting in it was by classes and by centuries—the first class being called first, and the others in their order. Each century had one vote, determined by the majority of its members. A majority of the centuries, being ninety-seven, was required for the passage of any proposed measure. The division into five or six classes, as the case may have been, was important only in the fact that the classes first called to vote might carry a measure without the necessity of calling upon the remaining classes; and the influence of the wealthier classes therefore became predominant. The result was either directly or indirectly that the power of the patricians always remained the dominant factor in the Roman commonwealth.

The Comitia Centuriata became the true General Assembly of the Roman people. It was the body which enacted laws, elected the great officers of the state, the con-

suls and prætors, and had the final jurisdiction in all criminal cases of a capital nature. The Comitia Curiata had at first a veto power over the determinations of the Comitia Centuriata, which in course of time ceased to have practical importance and became a mere formality; and some ratification on the part of the Senate was required to give effect to the acts of the Comitia Centuriata, which, however, was never refused. The organization both of the Comitia Curiata and of the Comiata Centuriata was retained in Rome throughout the whole period of the Republic; and notwithstanding that all power became vested in the Comitia Centuriata, the other assembly continued to possess many rights and privileges of a sovereign character, especially in matters of a religious nature, down to the end of Roman independence.

There was yet another general assembly of the Roman people, designated as the Comitia Tributa, or the Tribal Assembly or Assembly of the Tribes, as we may translate the words, wherein the people voted by tribes and a majority of the members of any tribe determined the vote of the tribe. But the term *tribe* here has no reference, it would seem, to the original division of the Roman people into the three tribes, Latin, Etrurian, and Samnite, whereof Romulus formed his combination. This tribal division was a division into wards or districts for the purpose of local administration. In these ward, or district divisions, the plebeians usually had a majority; and by their combination they sometimes found it ex-

pedient to enact measures to which were given the name of *Plebiscita*—Resolutions of the Commons we might call them—which the patricians and the Senate were frequently compelled to accept. The acts of the Senate were called *Senatus-Consulta,* or Senatorial Decrees, as those of the Comitia Tributa were designated as *plebiscita.* Neither were *laws* in the strict sense; although directly or indirectly they acquired the force of law. The laws of Rome properly so called, known as *leges* or laws, emanated directly from the Comitia Centuriata, and they were binding on the Senate and people alike.

It will be seen, therefore, that the organization of the Roman state, originally simple enough, became in course of time quite complex and involved; that it was neither a democracy nor an aristocracy in the Greek sense of those terms, although in the early days the aristocracy governed and afterwards always retained a predominating influence; and that there were many checks and balances in restriction of manhood suffrage and the recklessness of an unbridled democracy. It will probably have occurred to you that we are not without similar checks in our own governmental organization and that some of our institutions are based upon principles identical with those of the Roman commonwealth. We have borrowed more from the ancient Roman republic than we are generally apt to suspect.

The monarchical period of 244 years from B. C. 753 to B. C. 509, was the formative period of the Roman char-

acter and of the Roman organization. It was not a time of absolute monarchy. The monarchs were powerful enough; and they exercised legislative, executive, and judicial power. But they were always held in check by the necessity of consulting the aristocratic Senate in all important matters. In the year B. C. 509—just 19 years before the Battle of Marathon in Greece—occurred the Revolution under Junius Brutus and Lucius Tarquinius Collatinus, of whom the latter and perhaps both were relatives of the reigning sovereign, by which the last of the Roman kings, Tarquin the Proud, and all his family were driven into exile, and a republic proclaimed in Rome, with annually elected Consuls as the chief executive officers of the Roman state to execute the laws, to preside over the Senate, and to command the armies in time of war. The first consuls were the two leaders of the successful revolution just mentioned. The office of consul and its dual character seem to have been suggested by the example of Carthage, then the most powerful state on the western Mediterranean.

The Revolution, which drove out the Tarquins and established the Republic, would seem to have been more of an aristocratic than of a democratic movement. Its first result was to aggrandize the power of the Senate and of the patricians, and to depress the influence of the *plebs* or plebeians in the affairs of the state; and when the expulsion of the kingly government had been definitely secured, and republican institutions, such as they were,

had become firmly established, discord broke out between the two orders, and even civil war was threatened. The plebeians resorted to what might at the present day be called a gigantic strike; they had recourse to secession. They withdrew in a body from the city, and encamped on Mons Sacer—Holy Hill—in the Sabine territory, some four or five miles to the northeast of Rome. The patricians realized that they had gone too far in the denial of political and civil rights to the plebeians, and that Rome without its plebeian population would be exceedingly weak and might fall an easy prey to some of its jealous neighbors. A compromise was effected, and the plebeians returned to the city. But for upwards of 223 years (B. C. 509-286) the contest between the two orders in the state went on, the one struggling to retain its privileges, the other struggling for a larger share of political and civil liberty; and the extraordinary spectacle was presented of almost constant bickering and dissension between the two classes at home, while they maintained a united front towards the other nations and pursued almost uninterruptedly the wonderful career of conquest which first brought Italy and afterwards all the Mediterranean regions under the dominion of Rome.

In the year B. C. 454, after one of these internal contests had been in progress for some time, a truce was reached between the contending factions; and among the terms of pacification agreed upon there was a clause to the effect that the Roman laws should be reduced to

writing and codified. It would appear that one of the grievances of the plebs was the unsatisfactory condition of the laws, most of them apparently at that time unwritten and almost wholly under the control of the patricians for their interpretation and enforcement; and one result of the popular movement therefore was an agreement for the reformation of the legal system.

There was resident in Rome at this time a learned Greek exile from the famous city of Ephesus in Asia Minor, a man of philosophic turn of mind by the name of Hermodorus. He advised the Romans, by whom it appears he was held in high esteem, to organize a commission of capable men and to send them to Greece to study the laws of Sparta, Crete and Athens, and especially the legislation of Solon; and thereupon to prepare a code for Rome based upon the existing law and the experience which the commissioners might obtain from the operation of the systems of the several Hellenic states. The suggestion was readily accepted. It was a peculiarity of the Roman character that the people never believed that they possessed all the virtues and that nothing was to be learned from the experience of other nations. On the contrary, the Romans were always ready and willing to accept anything from other nations, and especially from Greece, which was deemed to be advantageous and superior to what they had themselves. Even in the days of their greatest greatness they were generally disposed to respect the usages and customs of the peoples whom

they incorporated into their vast empire, and to allow them the greatest possible degree of local self-government consistent with the supremacy of the Roman authority. And this was by no means the least of the causes which induced the permanence of their widespread dominion.

The commission was organized, and went to Greece. This was fifty-five years after the expulsion of the Tarquins; and it was the age of Cimon and Pericles in Athens. In other words, it was the culminating period of Hellenic splendor and civilization. What the commissioners brought back with them is perhaps not quite apparent; but the result certainly showed the influence of the legislation of Solon. A code of law was promulgated in the year B. C. 451, which was designated by the name of the Law of the Ten Tables, so called because it was inscribed upon ten tablets of brass set up for the public inspection on the walls of the Temple of Jupiter. Two other tables were soon afterwards added; and the Code was then known by the name of the Law of the Twelve Tables, and so continued to be known to after generations. It was the foundation upon which all subsequent Roman law was built; and it was the work to a very considerable extent of Hermodorus, the learned Greek from Ephesus. It was not, however, a Greek code transferred to Rome, but in the main a codification of existing Roman law with such addition and modification

as the experience of the Hellenic states, especially that of Athens, had shown to be beneficial.

Only fragmentary portions of the Laws of the Twelve Tables have been transmitted to us; and they are not of themselves sufficient to enable us to form any satisfactory estimate of the compilation as a whole. But it is much that they received the intelligent commendation of so true a critic and so honest a man as Cicero in his work *De Republica,* that of the Greek historian of Rome Dionysius of Halicarnassus, and that of the other great Greek historian of almost the same period, Diodorus Siculus. From these writers, and from the Roman law writers who wrote commentaries upon them, such as Gaius, Antistius Labeo, and others, we learn that the Laws of the Twelve Tables did not constitute a complete code of law, such as we would now understand by that phrase, but rather enunciated a collection of legal maxims of universal application sufficient to support and sustain the fabric of the law that was built upon it by the later development.

The commentator Gaius, to whom reference has already been made, one of the greatest and most accomplished Roman writers on the subject of law, and who lived in the time of the Emperor Antoninus, in the second century of our era, mentions two of the laws of the Twelve Tables, one of them concerning corporations or *collegia,* as they were called, and the other concerning boundaries, which he states were derived from the laws of Solon; and we may infer that there were others of

similar origin. But the code, whether of native growth in the main, or in great part of Hellenic origin, evidently proved to be an admirable basis for the magnificent superstructure that was reared upon it. How this superstructure was erected, and what agencies contributed to the great work, we may now consider. Like all other human institutions worthy of consideration, it was a development, an evolution from primary principles by the most competent race of lawgivers that has ever existed. For it was, in truth, a race that erected the edifice, and not any one person or number of persons. The rulers of Rome were a race of lawyers.

We have referred to the various Comitia or General Assemblies of the Roman people, by which the sovereign power of the state was exerted. It was the Roman theory, as it is our theory to-day, that all power was reposed in the sovereign people. As being merely a city, and therefore a state in which all the people could readily be congregated in town meeting, the Romans considered that the theory could be reduced to actual practice so far as the immediate government of the city itself was concerned, while the government of the provinces was left to the Senate, whose smaller number made it a more competent legislative assembly. Consequently the General Assembly, known as the Comitia Centuriata, where the people voted by centuries, was not only the ultimate source of power in Rome, but likewise exercised the power in concrete cases; enacted laws, elected officers, di-

rected the public policy, and sat as a supreme court of last resort in numerous cases of a judicial nature, especially those involving capital punishment. For the life of no Roman citizen could lawfully be taken except by the vote of his fellow-citizens convened in Comitia Centuriata; and even when the privilege of Roman citizenship was largely extended and was enjoyed by many of the provincial cities, those in possession of such right might appeal to the Comitia Centuriata at Rome, or subsequently to the Imperator or Emperor, when the Cæsarian Revolution had transferred the judicial authority of the people to the all-powerful Emperor, as we recall that St. Paul, who was a Roman citizen, is said in the Acts of the Apostles to have done.

The Comitia Centuriata was the supreme tribunal of law, as well as the supreme legislative body for the enactment of law. But the Comitia Curiata also exercised some judicial authority, as did the Senate mainly with reference to foreign affairs. Appeals from the provinces to the Senate in judicial matters, as well as for the redress of political grievances, were not infrequent. It will be remembered that the theory of the division of the powers of government into legislative, executive and judicial, and the independence of each in its sphere, were not then recognized. The officers known as Censors also exercised judicial authority, principally in matters affecting the public health and the public morality.

But the great development of Roman law was not

through the instrumentality of any of these organizations. During the greater part of the existence of the Roman Republic, as well as subsequently throughout all the time of the Empire, the active judicial authority of the Roman state was mainly vested in two great officers known as *Praetors,* and designated respectively as the *Praetor Urbanus* or City Praetor, and the *Praetor Peregrinus* or Foreign Praetor. These officers were next in dignity to the Consuls, who were only executive officers; and together with the Consuls, they were elected annually by the Comitia Centuriata. The first appointment of a Praetor Urbanus or City Praetor was in the year B. C. 366, about 85 years after the promulgation of the Laws of the Twelve Tables. The creation of the office of Praetor Peregrinus was subsequent in date. It was these two officers who mainly developed the Roman Law.

The Praetor Urbanus, or City Praetor, before the creation of the office of his colleague known merely as *the Praetor,* administered justice between Roman citizens; the Praetor Peregrinus or Foreign Praetor, or rather Praetor for the foreigners, administered justice in controversies between foreigners resident in Rome, and also in controversies between foreigners and Roman citizens. In the case of the absence or disability of either one, however, the other could perform his duties. Subsequently at various times additional praetors were created for the provinces, the number of whom differed at different times, once amounting to sixteen. In the ab-

sence of praetors from the provinces there were *praesides* (presidents), or other officers, to represent them and to take their place. The proconsuls also, who were the Roman Governors of Provinces, had some supervising judicial authority. In many cases the provincial cities were left free to make their own laws and to select their own judicial officers without interference from the Roman authority. But it was always sought to retain a certain amount of supervising power over the administration of the judicial system of the provinces in the hands of the provincial praetors. Otherwise, the judicial system in the Roman provinces did not substantially differ from that in Rome itself; and the difference gradually became less according as the superiority of the Roman method became evident. Finally the almost universal acceptance by all the provinces of the Roman jurisprudence and of the Roman judicial system became the greatest guaranty of the continuance of the Roman dominion over the civilized world and the surest pledge for the perpetuity of the Roman civilization.

The office of the Praetor at Rome was a peculiar one, not easily understood at the present time. It was his duty to direct the administration of justice rather than to superintend it. His duty was to settle the pleadings in controversies as they arose and were brought before him; to lay down the general principles of law applicable to the issues that thereby were evolved; and then to nominate *judices* (judges) to hear the evidence and to

decide the issues. These *judices* might be one or more in each case as the praetor might determine. Their appointment was subject to objection by the parties; upon the interposition of which, if the objection was deemed reasonable, other appointments would be made. Their selection was generally, although not necessarily, from persons acquainted with the law and having some knowledge of it; and in the performance of their duties, they were entitled to have the assistance of the *jurisconsults,* the lawyers or men learned in the law, to sit with them and to advise them, but not to vote in the determination of the controversy. They received the testimony, oral and written, heard the arguments of advocates for the respective parties, and rendered final judgment, which, it seems, was not subject to review of any kind by the praetor.

The judices were always presumed to be men learned in the law. In the selection of them for any particular case the praetor was usually left without limitation. At times, however, it would seem that by some usage or regulation a large number of persons, at one time as many as four thousand, were designated as competent to act as *judices* at the choice of the praetor. In the long contest in the early days between the patricians and the plebeians, to which reference has heretofore been made, the complaint of the latter frequently found expression in the statement that the patricians monopolized the *ju-*

dices and made themselves the only persons competent to sit as such.

It appears, therefore, that the *judices* in the Roman system performed the functions both of judges and juries with us; or perhaps their functions were more analogous to those of referees under the legal system of some of our states, notably the state of New York, with the exception that their judgments were final. Their courts were the ordinary tribunals for the adjudication of civil controversies; but their tenure of office was only for the occasion, and was not permanent in its character, except in so far as they belonged to a class always eligible to selection by the praetor for judicial duty. The praetor himself was not ordinarily a judge in our understanding of that term. He was more like the Lord Chancellor or the Lord Chief Justiciary of England in the ancient days of English law. But he was the great conservator of the Roman law, the authoritative expounder for the time being of legal principles, and the person who set in motion and controlled the whole machinery of the Roman law.

It is evident from what has been said that the persons, who presented themselves before the Comitia Centuriata of Rome as candidates for the office of Praetor, were expected to be men well versed in the principles of the law, and entitled to the confidence of their fellow-citizens for their high character and their attainments; and such they generally were, for, although incompetent men oc-

casionally were elected to the consulship, it is very remarkable that the scandal of unfitness, so far as we are informed, very rarely or never attached to the praetorian office in Rome. In the provinces, however, it was not always so. Verres, against whom Cicero launched the thunder of his eloquence, was a praetor in Sicily.

In the early days upon the entrance of the praetor into office, and sometimes even in anticipation of it, he proclaimed the rules of procedure by which he expected to be guided, and frequently emphasized the principles of law, generally although not invariably, taken from the Laws of the Twelve Tables, which he deemed most important in regard to the controversies prevalent at the time and which might be expected to come up for adjudication. This proclamation was called the *Praetorian Edict*. It was in its nature a summary of the result of previous experience and a rule of conduct for subsequent legal action; and there was rarely any inducement to make it aught else than an impartial expression of legal principles of universal application.

Thus, each successive Praetor in his Inaugural Edict generally embodied the rules laid down by his predecessors so far as they had been found to be beneficial in practice, with such additions and modifications as seemed to be demanded by the altered conditions of an advancing civilization. He might, however, issue an entirely new edict, if he thought proper; and the circumstances of the time sometimes appeared to dictate such a course.

But the edict was never an arbitrary or unprecedented manifesto of proposed action; and the only rivalry between successive praetors was to make their respective documents the superior of all previous efforts in the same direction. These successive edicts, emanating from the ablest legal minds in Rome, eager to gain credit only by the excellence of their enunciations of the law, became in course of time a full expression of the whole Roman law. By means of them the legal system of the Romans became so thoroughly developed, that, before the Republic came to an end, it assumed a form of consistency and perfection in which there was little left to be improved by subsequent ages. The Civil Law of Rome was elaborated from the Laws of the Twelve Tables by the successive Praetorian Edicts.

This Civil Law of Rome became the expression of the highest Roman civilization. It was the best contribution of the Roman Republic to the civilization of the world. With the arts of Greece and the Monotheism of Judea, it constituted the triple combination which has directed, and must continue to direct forever, the highest cultivation of the human race. No wiser or better system of law has ever been devised by the genius of man than the Roman Civil Law; and it is safe to say that it will remain forever unrivalled and unapproached in the annals of jurisprudence.

Perfected by the great lawyers of the Roman Republic, the Civil Law, elaborated by the Praetors, survived the

shock of civil war, survived the fearful disasters of Pharsalia and Philippi, survived even the brutality of successive Cæsarean emperors. Even the worst of the emperors sought to make no change in the Civil Law, but rather to improve and adapt it to the altered conditions of society. In fact, it was during the Empire that the great commentators arose whose treatises upon it contributed to popularize and elucidate the Civil Law. The names of Gaius, Papinian, Paul, Ulpian, and Modestinus were more noted in their time and in after ages, and they are more noted and better known to-day, outside of England and the United States, than are or were those of Bracton, Littleton, Fleta, Coke and Blackstone, in the annals of English jurisprudence. The work of Gaius especially became noted. He seems to have lived in the reigns of Hadrian, Antoninus and Marcus Aurelius, about the years of our Era, 140-180. Papinian, Paul and Ulpian followed soon after, and flourished in the reigns of the emperors Septimius Severus and Caracalla, about the year A. D. 200-215. Papinian was Praetor, or rather Praetorian Prefect, as the office was known at that time, under the reign of the Emperor Severus, whose personal friendship he enjoyed, and with whom he was connected by the ties of affinity. His is the greatest name in the history of the Roman Law. It stands out in bold relief like that of Sir Edward Coke in the annals of the Common Law of England; but Papinian was an abler, and infinitely better man than Sir Edward Coke.

The Civil Law of Rome, it may be remarked, had two grand divisions, the result of circumstances already stated, the one known as the Jus Civile proper, the law of the citizens of Rome; the other designated as the Jus Gentium, the law of the nations, or international law, being the law administered by the Praetor Peregrinus between the Romans and the foreigners who had relations with them, and between these foreigners themselves. The latter became more and more important as the dominion of Rome increased, and took in nation after nation of the world. Each reacted upon the other; and their development was on parallel and entirely homogeneous lines. In A. D. 216, the Emperor Caracalla, one of the worst ruffians that ever disgraced the Roman purple, but in this case possibly building wiser than he knew, issued a remarkable edict, whereby all freemen within the jurisdiction of the Roman Empire were admitted to the privileges of Roman citizenship. One of the results was to consolidate the Jus Gentium formally with the Jus Civile, and to make both component parts of one great universal system. In the mean time the law of the provinces had been silently, but irresistibly, brought into harmony and accord with the Roman system; and the Roman Jurisprudence dominated the civilized world. It was by far the strongest influence that kept the mighty Empire together, and made Spain, and Gaul, and Britain more Roman even than Italy.

The Commentaries upon the Roman Law became of

equal authority with the Praetorian Edict. The works of Gaius, Papinian, Paul, Ulpian, and Modestinus, the five most noted and authoritative of the commentators, were cited, as are the treatises of Coke and Blackstone with us. Numerous other commentators there were, and many private compilations of the law were made, and regarded as having more or less authority. The mass was becoming rather voluminous. The edifice reared upon the foundations of the Twelve Tables had been enlarged beyond all proportion. There was a demand for simplification and codification. The first answer to the demand was an edict of the Emperor Valentinian in A. D. 369, whereby it was prescribed that only the works of the five commentators before mentioned should be cited in the courts as authority. The Roman Empire had then become Christian; and there were some things in the old Civil Law which required to be brought into harmony with the new religion of the world. Finally, in A. D. 438, something in the shape of a code, wherein it was sought to condense all the law and to systematize it, was published under the order of the Emperor Theodosius II. It is known in history as the Theodosian Code, and it remained the law of the Empire for nearly a hundred years (A. D. 438-529). It was an imperfect performance, and it was wholly superseded in A. D. 529 by the great Code of the Emperor Justinian, in which the Civil Law of Rome became finally crystallized into completeness. This code has ever since been, and yet re-

mains, the perfect embodiment to us of the substance of the Roman Jurisprudence. It is proper, therefore, to give a brief account of it here and of the circumstances under which it was prepared.

In the year 527 of our Era, Flavius Justinianus, or Justinian, as we have abbreviated the word, a man of Albanian or Macedonian origin, became the ruler of the Roman Empire of the East, or the Byzantine Empire, as it was called in later days from the name of its capital, the old Greek City of Byzantium, which received from its second founder the name which it bears to-day of Constantinople. The Empire had been divided one hundred and thirty years before that time, on the death of the great Theodosius, and partitioned between his two sons, Arcadius and Honorius; and the divisions have become known to us under the names of the Roman Empire of the East and the Roman Empire of the West respectively. Within less than a century after the division, the Roman Empire of the West was overwhelmed and overthrown by the furious hordes of the barbarians from Germany, Scandinavia, and Northern Asia, who broke through the barriers of the Rhine and the Danube, overran and conquered province after province, and finally swept the enfeebled Empire out of existence. The Roman Empire of the East had been saved from the same catastrophe by the prudence and good management of a woman, the illustrious Empress Pulcheria, who knew how to baffle alike the attacks of Alaric the Visigoth and At-

tila the Hun, while the Western Empire made only feeble resistance to either. In the reign of Justinian the great reaction began. Rome sought to roll back the tide of the Northern Barbarism. By means of his two great generals, Belisarius and Narses, Justinian succeeded in reconquering all Northern Africa, part of Spain, the islands of Sicily, Sardinia and Corsica, as well as all Italy from the Goths and Vandals who had occupied them; and he reunited them to the Empire, which under his rule promised to regain some of its ancient vigor.

But the great work of Justinian was not that of the partial restoration of the old Roman Empire, but the codification of the Roman Civil Law. The execution of this work he conceived immediately after his accession to the imperial power, and he entered upon it as soon as the more pressing affairs of the Empire permitted. To Tribonian, the ablest lawyer of his time and a worthy successor of Gaius and Papinian, he committed the consummation of his scheme, which Tribonian, with the assistance of Theophilus, a professor in the law school of Constantinople, and Dorotheus, a professor in the law school of Berytus, in Syria, and some other competent associates, accomplished in a remarkably short space of time.

The accomplishment of Justinian, or rather of Tribonian and his associates, in the domain of jurisprudence was not merely a codification of the Roman law. The work was four-fold, and comprised the Code, the Digest,

the Institutes, and the Novellae or Novels. Possibly we might get a rough, although very inadequate idea of these works if we compare them to the Revised Statutes of the United States, a Digest of the Decisions of the Courts, Kent's Commentaries on American Law, and Richardson's Supplement to the Statutes. The relation which these four bear to the law and to each other is somewhat analogous to the position occupied by the four great works of Justinian in the Roman Jurisprudence.

The Code of Justinian is, as its name implies, a collection of all the statutory enactments of the Law of Rome existing and in force at the time of the compilation. It is divided into twelve books, classified according to subjects, and contains 4,600 enactments, with a statement of the time when each enactment was first made. This is the plan pursued in the Revised Statutes of the United States published in 1874. And when we recall the fact that the number of sections in these latter is 6,897, and that the statutory jurisdiction of the United States is exceedingly limited, the extent of the Justinian Code is rather remarkable for conciseness.

The Digest or Pandects—both terms are used indiscriminately, the one being Greek, the other Latin—may be likened, as already stated, to an abstract of the decisions of the courts upon subjects which have been brought before them for adjudication. It is an elementary treatise on the whole law, intended alike for the use of students and for the use of those who administer-

ed the law; and it is a revision and condensation of all the previous authoritative commentaries on the law into one consistent whole. It contains seven parts, subdivided into fifty books; and it follows in the main the plan of Gaius in his commentaries, which are very often cited and quoted.

The third of the four great works of Justinian is designated as the Institutes; and it is that to which recourse is usually had by the student for a general knowledge of the principles of the Roman Law. It may be compared to the Commentaries of Coke, or Blackstone, or Kent, except that these are not authoritative and the Institutes of Justinian are. It had been anticipated by Tribonian that the Digest would prove too large and voluminous for ordinary use, besides being encyclopædic in its nature, and consequently, with the approval of the Emperor, he prepared the Institutes. It is a compendious and yet complete treatise on legal principles. Like the work of Blackstone, who borrowed several of the ideas of Tribonian, it is divided into four books, on lines somewhat analogous to those of the English commentator. Two of these books were written by Theophilus and two by Dorotheus, under the general supervision of Tribonion; and the whole was carefully revised by all three of its authors. It remains to-day the best commentary that has ever been written on any law.

The Novellæ or Novels, the fourth of the legal works of Justinian, is merely an appendix or supplement, which

is what its name implies. It contains various laws and ordinances that had been omitted by inadvertence from the Code or Digest.

The Code, the Digest, the Institutes, and the Novels, were all alike the production of Tribonian, ably assisted, however, by Theophilus, Dorotheus, and some others. They show their celebrated author to have been one of the ablest and greatest of Roman lawyers, a worthy successor of Gaius and Papinian, and one of the most indefatigable authors of his own or any other time; and the whole is an imperishable monument to the memory of Justinian and to the genius of ancient Rome. These four works constitute what is called the *Corpus Juris Civilis,* or the Body of the Civil Law—which name it received to distinguish it from the *Corpus Juris Canonici,* or Body of the Canon Law of the Christian Church, which even then had taken shape and form as a regular legal system. And the *Corpus Juris Civilis* and the *Corpus Juris Canonici* became the two great legal systems of the Middle Ages, which constituted the subject of advanced study in the great universities of those days, and led to the granting of the now much abused degree of LL.D., or Doctor of the Two Laws, to successful students who had passed with honor through the various courses.*

*Note. The expression "Civil Law" has different meanings in different connections. It is sometimes used to designate the law in civil matters as distinguished from the criminal law. It is sometimes, although less frequently, used as the equivalent of "Municipal Law," or the law of the state. But its most frequent use is that which it has technically received

Thus, about 980 years—we may say a thousand years —after the promulgation of the Twelve Tables (B. C. 451—A. D. 529) the Civil Law of Rome was finally fashioned and perfected, and enshrined for all time in the Code, the Digest, and the Institutes of Justinian. During this period of a thousand years, with such assistance as they received from the laws of Solon, which was not small, and such aid as they received from Phœnicia, Rhodes and Carthage, the extent of which it is now impossible to ascertain, the great constructive minds of Rome, the greatest builders of empire and the greatest fashioners of the science of jurisprudence whom the world has ever known, elaborated the primitive principles of natural justice into the wisest and most perfect system of law that has ever been devised or evolved by the genius of man in any nation. For to its consummate wisdom and its infinite superiority over every other system of law, our boasted Common Law of England not excepted, no impartial student of the law, who is familiar with the subject, ever fails to bear witness. We may have occasion to see in the sequel why it deserves this palm of superiority.

A superficial view of the history of Rome may elicit

as the municipal law of Rome, the terms Civil Law, the Civil Law of Rome, the Roman Civil Law, and the Roman Law, being used indiscriminately to designate the legal system derived to us from ancient Rome and embodied in the works published under the direction of the Emperor Justinian. This technical meaning long accepted has compelled recourse to the arbitrary expression "municipal law" as a designation of the law of the state generally.

surprise that, amid all its almost uninterrupted career of war and conquest, varied only by internal dissension and even internecine strife, the Romans found time to develop so magnificent a system of jurisprudence. But as Numa, the calm and quiet legislator, followed Romulus, the strenuous man of action, the praetor or propraetor followed the proconsul wherever the Roman arms went; and there was no time lost in reorganizing on a permanent basis the social order of the acquired territory. With due and tactful regard to local usage and custom, and even to the principle of home rule, as far as it could with safety be adopted, the great principles of the Roman Jurisprudence were everywhere introduced, and found speedy acquiescence in the minds of all the inhabitants of the provinces. If the great empire acquired by the Roman Republic was founded upon force, it was firmly grounded upon jurisprudence. What was achieved by the former was secured by the latter. The secret of the long continuance of the Roman dominion over so many different nations, the secret of the blending of the heterogeneous mass into a comparatively homogeneous whole, is to be found in the justice administered under the Roman Jurisprudence, rather than in the strength of the Roman arms. It is a curious fact, perhaps not sufficiently emphasized by the historians, that never once, after the conquest and pacification of the provinces, was there a rebellion anywhere against the Roman authority with a view to the restoration of na-

tional independence. Rebellions there were often enough, instigated by oppressive conduct on the part of some of the Roman governors, which, however, were comparatively few, or caused by pretenders to the imperial purple in the time of the Empire; but never was there any uprising against the Roman system, except on one or two occasions by the Jews under the instigation of false Messiahs. By the careful student of history this phenomenon can be attributed only to the influence of the Roman jurisprudence.

CHAPTER VII

THE CONTEST BETWEEN THE CIVIL LAW OF ROME AND THE "COMMON LAW" OF THE TEUTONIC BARBARIANS

The Civil Law of Rome found its final expression in the Code, the Digest, and the Institutes of Justinian. Unlike the subsequent common law systems of Europe, unlike the Common Law system of England, the Roman Law was the product of a free people, and the best and noblest development of the Roman civilization. It had now a long contest of a thousand years to undergo with the forces of barbarism; but it has finally emerged victorious from that contest and again dominates the civilized world. It is proper now to sketch that contest. For an intelligent appreciation of it, we must go back to its source.

The Roman Republic attained the zenith of its power and greatness, although not its greatest territorial limit, about fifty years before the Christian Era. It ruled, and was itself practically, the civilized world. Its sway extended from the Valley of the Euphrates and the Mountains of Armenia, on the east, to the Atlantic Ocean, on the west; and from the Cataracts of the Nile and the

African Great Desert, on the south, to the seas that surrounded the British Isles, on the north. All the regions surrounding the great basin of the Mediterranean, all the regions famous in ancient history, such as Egypt, Assyria, Palestine, Asia Minor, Greece, Macedon, Carthage, Spain, and Gaul, and of course Italy, had come within its dominion, or had become subject to its influence.

We need no very intimate acquaintance with their history to learn that the Romans of the Republic were a people of peculiarly strong character and wonderful administrative ability. They were, in fact, the most sagacious and the most successful ruling race of all the world; and there never has been another race to be compared with them in that regard, not even our own enterprising Anglo-Saxon race. For our Anglo-Saxon race has been successful only in extirpating the weaker peoples of the world, while the Romans cemented into one great empire the strongest branches of the strongest races of the earth, Greeks and Egyptians, Syrians and Macedonians, Gauls and Spaniards. In this work of assimilation and cementation, the greatest influence was that of the Roman Jurisprudence, which was adopted with surprising readiness by all the peoples of the Empire.

In the year B. C. 49, after a remarkable career of nine years as governor of Gaul, during which he had driven back beyond the Rhine the German invaders of that coun-

try, bridged and crossed that river into Germany, reduced a part of the latter country and all Gaul under the dominion of Rome, and twice invaded England and advanced as far as London, Julius Cæsar, greatest of conquerors and greatest of assassins—for his work was the deliberate assassination of his country's freedom—crossed the Rubicon from his province of Gaul, marched upon Rome, and overthrew the Republic. It is true that some eighteen years passed before the final doom of republican institutions in the Eternal City, and that in the mean time the great battles of Pharsalia and Philippi were fought, which proved so disastrous to Roman liberty; and the transition from republicanism to imperialism was not finally accomplished until the morning of September 2, B. C. 31, when, at the naval battle of Actium, in northwestern Greece, inspired by some motive which the world has never yet definitely ascertained, Cleopatra, Queen of Egypt, fled from the scene of conflict with the greater part of her galleys, when victory was already almost within her grasp, and her profligate and worthless paramour Mark Anthony followed her, and left the empire of the Roman world to young Octavian, the grand-nephew of Julius, and better known to us by his subsequently assumed name of Augustus Cæsar.

Thus the revolution was effected whereby the Imperator, as he was called, the General of the Army, a title which the modern languages have corrupted into that of Emperor, became the ruler of Rome, in the place of the

sovereign people and the aristocratic Senate. As usual, the people themselves, or at least the lower classes, had contributed directly to the result. It is always by the agency of these classes that the military adventurer achieves success.

Following Augustus Cæsar came 56 Emperors, not all of them, however, consecutive, for a period of 292 years, until another and a greater revolution had been effected, quietly, silently, and thoroughly, when one day, in A. D. 312, the Roman Empire awoke to find itself Christian, and Constantine the Great became Emperor. Christian Emperors followed, except Julian the Apostate, for 89 years; and then upon the death of Theodosius the Great (A. D. 395) the Great Empire was divided into that of the East, with its capital at Constantinople, and that of the West, with its capital at Ravenna. The Roman Empire of the East lasted after this for a thousand and fifty-eight years (A. D. 395-1453), with varying fortunes, although always a strong bulwark of the Greco-Roman civilization against the northern, as well as the oriental, barbarism by which it was constantly assailed. One of the ablest and most successful rulers of this Empire of the East was Justinian, already mentioned as the inspirer of the Code of the Civil Law made during his reign, and who likewise, by means of the victories of his two able and successful generals, Belisarius and Narses, reconquered and reunited to the Empire several provinces of the West, including Italy itself, which had been

dismembered from it by the Barbarians. The Empire of the West, whose subsequent fortunes and fate more nearly concern us, lasted only for eighty-one years (A. D. 395-476), and was terminated under the reign of its last weak sovereign, who bore the suggestive name of Romulus Augustulus, by the barbarian chief Odoacer, who seized the government and took the title of King of Italy in A. D. 476.

The Roman Republic was not an ideal state, but it was infinitely better than the Empire which succeeded it. The Empire, however, was not the worst that ever existed. Although it included among its rulers such detestable wretches as Caligula, Nero, Domitian, and Caracalla, it also numbered among them a greater and abler succession of chiefs than any other empire or kingdom that has ever existed, due no doubt to the fact that the Empire was not hereditary. But it is a peculiar fact that, in the change from the Republic to the Empire, and afterwards through the long line of the Cæsars, the forms of Republican Rome, the Senate, the Consuls, and the Praetors, were all retained, with occasionally a semblance of their ancient authority. But no Comitia Centuriata were ever summoned again; the Imperator became the heir of their power. What is most remarkable, however, is that the revolution only very slightly affected the Roman Jurisprudence. The system remained the same in Imperial, as in Republican Rome. Indeed, the great lawyers of the Imperial Period perfected the work

of the great lawyers of the Republic; and, as we have seen, the Civil Law of Rome found its fullest expression in the monumental work of the Emperor Justinian.

Notwithstanding that in the period of the Republic there had been a long and often acrimonious contest between the patricians and the plebeians, a distinction which perished in the time of the Empire, and notwithstanding that the institution of slavery existed in Rome, as it did in all the ancient and most of the modern states of the world down to a very recent period, neither circumstance greatly, if at all, affected the Roman Jurisprudence. The Roman social system more nearly resembled our own of to-day than our system resembles that of England of two hundred years ago. The freemen constituted the state. There were no degrees among them, no titled nobility, no privileged aristocracy, no hereditary castes, no distinctions whatever of rank, except such as tenure of office temporarily gave, as with us. All persons were equal before the law. Ownership of land was allodial or absolute, as it is now with us; and the land was available for all the purposes of commerce, was freely transferable by deed or will, and passed equally by inheritance to all children, male and female, alike. Husbands and wives were virtually partners in respect of their respective rights of property. Married women were perfectly free to control their own separate estates. Intercourse was free between all parts of the Roman world. Art and industry and literature flour-

ished everywhere; and the face of the Empire from the Straits of Babel Mandeb to the Caledonian Wall was dotted with rich and populous cities, more numerous and more prosperous than have ever since been known in the greater part of those regions.

But is there anything remarkable in all this? It will be perceived how remarkable it is when we consider the tremendous cataclysm that intervened between that day and ours, and what a fearful struggle it has been to restore the Roman civilization that was for a time overwhelmed in the cataclysm. For, as we will see, all our modern work is no more than a restoration of the Roman system.

It has been said that, "probably the darkest hour in the annals of time since the fathers of the human race went forth from Ararat, was that when the barbarians of the North burst through the barriers of the Roman Empire, drenched the plains of Gaul and Spain and Italy with blood, desolated their cities, ravaged their homes, covered the Mediterranean with their piratical fleets, destroyed the ancient marts of commerce, plundered the shrines of art and science, almost annihilated literature, subverted all the safeguards of society, and for the civilization of Rome substituted the unmitigated barbarity of the sword."

On the northern and northeastern frontier of the Roman dominion—in the countries now known as Germany, Sweden, Norway, and Russia—lived rude, savage,

nomadic tribes, whose support was the chase and whose normal occupation was war. Their mode of existence was not very different from that of our American Indians at the time of our first colonization of this continent. Between these barbarians and the Romans there was an almost continuous state of hostility, such as we used to have on our own frontiers. The Rhine and the Danube, marked by a long line of fortifications and fortified towns, generally constituted the boundary between these tribes and the Empire, and were the scene of constant struggle between them. In this contest the barbarians were nearly always defeated, and they were driven back farther and farther into their forests; but the Romans, whose emperors had no such definite policy as the Senate had in the days of the Republic, made the fatal mistake of being content to hold the line of the two great rivers, instead of pushing their conquests, as they should have done, to the Baltic Sea and the Ural Mountains. The mission of Rome was to conquer and to civilize. The ambition of Rome was no vulgar ambition inspired merely by the lust of power and the hope of plunder. When properly considered, it was a mission most beneficial to humanity. In the performance of that mission it was a mistake for the Roman Eagles to have rested until all Europe, and even all Southern Asia to the Indus and the Altai should have come within their grasp. It was the beginning of the end of their Empire when they became content to remain within the lines of

the Rhine and the Danube and the Euphrates; and consequently the period of decline and decay is well dated from the reign of the Emperor Hadrian who inaugurated this policy of restriction.

In the fourth century of our Era, urged onward, as it would now seem, by the pressure upon them of Mongolian tribes from Central and Eastern Asia—for there seems to be good reason for the proposition that the first impulse to the barbarian movement was given in the far off and then almost unknown Empire of China by the expulsion of the Huns, or Hiougnu, as they are called by the Chinese, from that country about A. D. 352—all the barbarian hordes from the Baltic to the Black Sea were put in commotion. Like a vast tidal wave, they burst upon the Western Empire of Rome, and poured in countless multitudes over the frontier.

The Roman Emperors of the West during all this period were probably the weakest and most incapable rulers that ever officiated at the downfall of a nation. They were imbeciles, corrupt and voluptuous. Their ministers were unprincipled and treacherous. Indeed, several of their ministers were themselves of barbarian origin, without sympathy for the Roman civilization. The Roman legions were no longer composed of the men who had conquered under Aurelian and Constantine. They were legions of Rome, but not Roman legions. They were themselves, in fact, mostly recruited from the ranks of the barbarians. There was yet, it is true, power

enough in the people of the Empire, as well as virtue and intelligence, that might have been rallied to the support of the crumbling edifice of civilization, but there was no one to lead them. In spite of the silly jargon of the moralists who enlarge upon the crimes of Rome and upon the decadence of the Roman people at this time, there was never in fact a time when the mass of the population of the great Empire was more virtuous, more intelligent, more capable of efficient organization than at this very moment of the irruption of the barbarians; and what they accomplished sporadically under some two or three competent leaders, like Aetius, Syagrius, and Boniface, was ample evidence of what they could have accomplished for the Empire in general, if the Roman rulers of Ravenna had been competent to organize or lead them. But there was neither organization nor leadership, and there was abundance of treachery and corruption. Without organization and leadership it is impossible that any nation should successfully encounter an impending crisis, no matter what may be its reserved force. The great essential for all success is organization; and the Roman Empire of the West at this time was utterly without organization. There was moreover the universal grievance of unjust taxation, wrested from the people not for the maintenance of the integrity of the Empire, but to be spent in wanton luxury by parasites and prostitutes at Ravenna. Unjust taxation and the absence of organization opened the way to the barbarians and caused the

ruin of the Roman Empire, and not want of virtue in the Roman people or the memory, which had never existed, of oppression and wrong committed by the Romans upon the Barbarians.

Only a feeble resistance was offered to the invaders, and the Roman Empire fell. Goths, Vandals, Franks, Burgundians, and other hordes revelled amid the ruins of a mighty civilization. In the year 410 of our era Alaric the Visigoth captured and plundered the Eternal City, which had boasted to have never before opened its gates to a foreign foe. Genseric the Vandal soon followed, and he too plundered Rome. Finally one Odoacer, a soldier of fortune from Illyria, deposed the last Roman Emperor Romulus Augustulus, and put an end to the Roman Empire of the West, A. D. 476.

Not alone Italy, but every province of the Western Empire, Britain, Gaul, Spain, Northern Africa, and Sicily, were plundered and desolated by the barbarians. Fire and sword, blood and slaughter, marked everywhere the progress of the brutal hordes; and they came to stay and to perpetuate their bloody career of conquest. The sickening story has been told by many a historian, but scarcely with the result of eliciting our full appreciation of all its horrors. If you can imagine our red savages of the northwest multiplied a thousand fold and pouring down in resistless hordes across the St. Lawrence and the Mississippi, laying Chicago in ashes, pillaging St. Louis, consigning Cincinnati to massacre and ruin, devastating

the valleys of the Hudson and the Delaware and the Susquehanna, and from our fair capital of Washington, at last parcelling out our desolated union into petty principalities for dusky Indian chieftains to be held by the sword as by the sword they had been conquered—if you can imagine all this, and then the massacre of Wyoming on a continental scale, with all the crime and cruelty of a savage human nature let loose—you will have a picture of Europe when the Roman Empire fell before the savage hordes of Germany and Scandinavia. These were white savages, ours are red. There was no difference between them, except that the Teutonic savages had a limited capacity for civilization. Nor need it diminish our horror that some of these barbarians were among our ancestors.

Rome fell; Roman civilization went down in blood and carnage. A new Europe ultimately arose out of the ruins, but for many centuries it was only a dismal barbarism. The so-called Dark Ages of Europe were the result of the turmoil, and they were dark because these barbarians and their descendants continued to make them so. And yet some writers of what is supposed to be a more enlightened time, with a strange realization of the fable of the wolf and the lamb, laud these barbarians for virtues which they never had, gloss over their cruelties, and seek to belittle those who alone in that iron time sought to uphold the torch of human civilization.

Most of the Teutonic tribes, at the time of their irrup-

tion into the Roman Empire, professed the bastard Christianity of Arianism. Many of them remained in name as well as in fact worshippers of Odin and the grim old gods of the North; and those of them who professed to be Christians never discarded their pagan superstitions. But whether they were Christians or Pagans in name, they were barbarians all the same—barbarians amid a refined, although perhaps enfeebled civilization. So finding themselves face to face with that civilization, almost amazed at their own success, generally constituting a comparatively small minority in the presence of what we may call an abundant Romanic population, the barbarians reasoned, not entirely without plausibility, that the only way in which they could secure themselves in the conquests which they had made was the perpetuation of their military organization by which those conquests had been effected. Consequently they transformed themselves from armies of invasion into armies of occupation. They compelled the Romanic populations to divide with them their lands and goods; and that which they thus acquired they parcelled out among themselves upon the theory of a continuing military organization. The general of the invading army, who now became king of the conquered country, received the surrendered property to himself in the first instance as the representative of his tribe. Reserving a considerable share of it for his own use and for the use of his household and immediate retainers, he divided the resi-

due among the principal officers of the army, on condition that, for his and their safety and protection, and to assure themselves in the possession of their acquisitions, they should continue to render to him upon his call the military services by which they had been enabled to achieve their success. These officers in course of time became known as dukes and marquises and counts and barons. They, in turn, subdivided the property granted to them on the same military principle, and allotted shares thereof to their subordinates on condition of similar military services to be rendered to themselves. And thus the division and the subdivision went on. Each officer and soldier received his share of the spoils upon the theory that all constituted one great standing army, each subordinate proprietor of the land, if proprietor he could properly be called who was no more than a tenant upon condition, being responsible, as in an army, to his immediate superior officer, and bound to render to him homage, and fealty, and military service.

Thus were laid the foundations of what is known as the Feudal System, which dominated the social organization and the jurisprudence of Europe from the time of the downfall of the Roman Empire in the fifth century to the outbreak of the French Revolution at the end of the eighteenth century, and a knowledge of which is an essential prerequisite to a proper understanding of the legal systems of Europe during the Middle Ages, and among them our so-called Common Law of England, now

supposed to be the survivor of all the systems of jurisprudence based upon the institution of Feudalism. This *was* the Feudal System; for the system was the organization of society and of the state upon the basis of a military tenure of land. Of course, it was not perfected at once; but it ultimately became the Common Law of all Central and Western Europe, with some notable exceptions.

The Feudal System was applied in the first instance only to the Teutonic tribes themselves and to the lands taken by them. The Romanic populations were generally left to their own laws, and to the undisturbed enjoyment of the Roman Jurisprudence. The cities especially were left unmolested in consideration of some tribute paid or to be paid by them, and they remained the stronghold of the Romans, the inheritors of Roman liberty, and the conservators of the Roman civilization. The barbarian chiefs usually established their seats upon some frowning eminence, capable of being strongly fortified, and here they grouped their warriors and retainers around them, and overawed the surrounding country.

The result was that two separate and distinct communities were formed within the same state, one of which, we may call the Teutonic barbarian, the other the Romanic, each with its own laws and characteristics, and each with its own tribunals to decide its controversies. Collisions, of course, occurred between the two, and when collisions occured, and there was difficulty to determine

by what tribunal they should be adjudged, it was, perhaps, no more than natural that the barbarian, who had the power of brute force and military organization on his side, should have discriminated in his own favor, and the peaceful citizen had then generally no option but to submit to the rude power of the conqueror. Some of the more enlightened chiefs of the Teutonic tribes, like Theodoric the Ostrogoth and Clovis the Frank, were desirous enough, after their conquest, to harmonize the interests of the several classes of people subject to their authority; but, in consequence of their very limited control over their own Teutonic followers, their efforts met with no great success, and the irritation went on for many ages.

The soldiers of an army of occupation have it in their power to harass and oppress with impunity the defenceless people among which they are quartered; and they rarely fail to avail themselves of their opportunities. A people is generally glad enough at last to purchase protection for life and property at the expense of its liberty; and for the sake of that protection it becomes willing to enter within the pale of the military law which protects the oppressor. This was the experience of all the dismembered provinces of the Roman Empire; and thus it was that the Teutonic invaders of Southern and Western Europe, having first formed themselves into isolated encampments among the nations which they had conquered, so annoyed the old inhabitants by their depredations that these latter in self-defense became willing

to surrender themselves and their lands to the barbarian king, to receive back the lands from him as his vassals upon terms analogous to those upon which their Teutonic conquerors held their acquisitions, to abandon their own laws to a greater or less extent, and thus to enter as component members into the military organization of society. They did not, it is true, generally become soldiers or liable to military service, nor did their tenures of land become purely military tenures. Their holdings were the holdings *in socage,* as the expression is, which is so well known in the pages of Blackstone and the older English writers on the Common Law; and the services, which were to be rendered by the holders of such lands, were services which to-day would be rendered by the commissariat of an army.

Thus it was that the Feudal System became general throughout the greater part of Europe, outside of the great cities. These latter very generally maintained a condition of quasi-independence and something of the institutions which they had in the old Roman times. The City of London was a remarkable example of the survival of Roman institutions even in England, where ultimately the Feudal System became most firmly seated.

Writers of fiction—and in this category I expressly include in the present connection the greater part of our English and American historians—have sought to throw a halo of romance about the Feudal System and the old feudal days of Europe. How often in reading their

books have our youthful fancies been thrilled by the names and the daring deeds of the Percys and the Douglases, the Nevils and the Talbots, the Montmorencys and the Colonnas, the De Montforts and DeLaras, whose names are so conspicuous in its annals! Does not even yet, a mysterious interest cluster around the castles that "overhang the wild and winding Rhine," and the strongholds where border warfare raged in the old feudal times? But we may charitably assume that the picture has been drawn in ignorance of the facts as they are now known to the impartial student of history. The robber barons of the Rhine, and the bandit brood that swarmed from Normandy with William the Bastard, and the border ruffians of the Cheviot Hills, differed only in degree, and not in kind, from the pirates of Barataria and the Buccaneers of the Spanish Main. Lafitte and Captain Kidd were no worse, and not much better, than Earl Douglas, Richard Coeur de Lion, and Frederic of Hohenstaufen.

The Feudal System destroyed as far as it could the Roman allodial or absolute ownership of land. It made every man a tenant or holder merely, and not an owner —a tenant holding conditionally from some one above him, until finally the king was reached, who was the sole and only absolute holder, and who thereby naturally and necessarily became an absolute monarch—for the Feudal System everywhere led to the establishment of absolute monarchy. Originally the tenancy of land under the

system was for life only, and there was no right of inheritance. When subsequently the theory of inheritance was accepted by the Teutonic invaders—and, of course, they very soon found themselves compelled to adopt it—it was often clogged with onerous and sometimes infamous conditions, which even the polished ingenuity and spacious falsehood of Blackstone have failed to gloss over with a successful veneering. With the law of inheritance was introduced the infamous rule of primogeniture—the rule that the first-born son might take the whole inheritance to the exclusion of all younger children, who were left to starve or betake themselves to highway robbery for a living. The Feudal System required soldiers, not citizens, and the eldest born was deemed the most competent, in its policy, to take his father's place in the performance of the military duties which constituted all the duties of citizenship that Feudalism regarded as essential to the welfare of the state. It admitted the other sons, however, in the order of their birth—that is, in the order of their presumed military usefulness—whenever death made a vacancy in the ranks of the military organization. But for a long time it refused to admit woman to the inheritance under any circumstances, because woman was not constituted by nature for military duty. It was only when Christianity had so far civilized the barbarians as to be able to ingraft the spirit of chivalry upon Feudalism, and the Christian Church of those days held forth, next to the God-Man

who died upon Calvary, the Mother-Maid of Nazareth as the great exemplar of all that was noble and beautiful and good, that Feudalism at last reluctantly consented to give woman a limited place in its system, and allowed her to take the inheritance when there was no one else to take it.

Under the Feudal System no one might dispose of lands by will. Married women had no rights which their husbands were bound to respect, either rights of person or rights of property, except in so far as the Church incidentally protected them; they could enter into no contract, and were allowed no management of their own property. And its criminal law was the worst that has ever yet been devised by the evil genius of man. Forfeiture of lands and goods, whereby innocent offspring were left to starvation and death, was the usual concomitant of every crime punishable with death. And we will have occasion to notice hereafter how numerous the crimes were which were punishable with death and forfeiture under the Common Law of England.

These were the salient features of the Feudal Law in regard to crime, the domestic relations, and the ownership of real estate. Personal property, other than the demesticated animals, can scarcely be said to have had an existence under the system.

Both in its inception and in its development the Feudal System was a purely military system, and therefore of necessity a system of ruffianism and oppression. Black-

stone, after explanation of some of its general features, is shameless enough to call it "a plan of simplicity and liberty" (Com. B. II, p. *59). The merit of simplicity it certainly had; government by the sword is always simple. Despotism needs no complicated legal machinery of any kind. But the lawyer's tongue should have been palsied that characterized the Feudal System as a "plan of liberty." It was a sycophant lawyer, false to all sense of honor, false to the free spirit which was even then growing in England, that made the infamous statement. There are many falsehoods in Blackstone; this is one of the worst and most contemptible of them. The reign of freedom and the rule of the sword are radically antagonistic. The reign of freedom is the reign of law; and the lawyer and the soldier, as such, are ever at variance. There can be no freedom where the military system is dominant. The old Roman writer who made the remark, "*Inter arma silent leges*"—"*amid the clash of arms the laws are silent*"—had a truer conception than Blackstone of the incompatibility of freedom and the military system, if indeed the latter did not, as is more likely, deliberately and wilfully utter an untruth.

The institution of Feudalism triumphed over the Roman Jurisprudence, but it was only for a time, although a very long time. It could not last except in the perpetuation of barbarism. The spirit of civilization soon reasserted itself, and the long and painful reaction of more than a thousand years began. In fact, the reac-

tion set in immediately. The Christian Church, armed not only with its own supreme spiritual authority, but likewise with the Roman law and the Roman civilization, of both of which it remained the sole conservator, undertook the gigantic task of the conquest of the conquerors and the civilization of the barbarians. No greater task was ever imposed upon civilized man, and only the Christian Church could have assumed it. The great victory was ultimately won; the great duty was fully accomplished. And yet it may also be said that the efforts of the Church, notwithstanding the inexhaustible stores of religion and civilization in its possession, were never fully successful, since there is a very large remnant of that barbarism remaining to-day.

There were some remarkable episodes in the great struggle—notable, the Crusades, the growth of the great Free Cities of Italy and the Rhine, the establishment of the Italian and Swiss Republics and of the Hanseatic League on the Baltic Sea, the invention of printing and gunpowder, the world's two greatest civilizers after Christianity, the renaissance of literature and art in the fourteenth and fifteenth centuries, the discovery of America, and last, but not perhaps least potent, the French, and American Revolutions. All these tended to shake and finally to overthrow the institution of Feudalism; but they were no more than salient episodes in the great continuous, unintermitting and desperate war between Feudalism intrenched in the powerful monarchies of Ger-

many, France, Spain and England, and the Christian Church, almost unaided and alone, beset with a thousand difficulties, and armed only with the resolute and unfaltering courage of a true intelligence.

In the struggle with the barbarians the Christian Church had one great advantage. All the education of the age had remained with it and with the Romanic population which it sought to protect against the brutal aggression of the barbarians. These latter were ignorant, unable to read and write, and with no knowledge whatever of anything but the art of war. So degraded indeed were they that they sometimes even boasted of their ignorance. It may be recalled that, in his poem of Marmion, Sir Walter Scott represents Earl Douglas as saying:

> "At first in heart it liked me ill,
> When the King praised his clerkly skill.
> Thanks to Saint Bothan, son of mine,
> Save Gawain, ne'er could pen a line."

And Earl Douglas was no exception to the feudal classes. For a thousand years it remained the rule, with comparatively rare exceptions, that none of the feudal classes of Europe could write or read. A king of England, Henry I, who happened to be able to read, but with little or no education beyond that, received the title of *Beauclerc,* or *fine clerk,* for his very small accomplishment.

The result was that, when the feudal chiefs, beginning even as early as Theodoric the Ostrogoth and Clovis the

Frank, rude and illiterate soldiers as they were, found themselves compelled, as they soon did, to strive to bring something like order out of the chaos which they themselves had caused, and for that purpose to enact suitable legislation for the discordant mass of the people over whom they ruled, they were forced to have recourse to the priests and bishops of the Church as the only persons then competent by their education to perform the work. Both on the score of religion and on that of their knowledge of the Roman Jurisprudence, the priests and bishops of the Church became the advisers of kings and potential in their councils. For about three hundred years they found themselves handicapped by the bitter and persecuting spirit of Arianism which dominated, in conjunction with their inherent paganism, the Visigoths of Spain and the Ostrogoths and Lombards of Italy, as well as the Burgundians in France and Switzerland. But it was fortunate for the cause of civilization that the Franks, who soon became the most important of all the barbarian hordes, were pagans, pure and simple, when they crossed the Rhine, and adopted the tenets of Orthodox Christianity as soon as they became professing Christians. The position of the Franks tended to simplify the problem which the Church was called to solve.

Now the ranks of the Church were mostly recruited from the Romanic population, not from the feudal classes. Comparatively few of the feudal classes became churchmen for three hundred years and upwards

after the Downfall of the Roman Empire. Afterwards the proportion became somewhat larger; but it is safe to say that throughout all the ages it was the old Romanic population, and not the feudal classes, that contributed mainly to the priesthood and episcopate of the Christian Church. Naturally the sympathies of churchmen were with the races from which they had sprung, even apart from the sympathy engendered by literature and religion; and when churchmen came from the feudal classes, as in the later days they more freely did, their education was in the literature and jurisprudence of Rome, and the principles which governed their actions took form and shape from the civilizing influences of the seven-hilled city. Many of the ecclesiastics, especially the bishops, who came from the ranks of Feudalism, became the most earnest antagonists of the Feudal System.

With the assistance of the bishops of the Christian Church, Theodoric the Ostrogoth in Italy, Alaric II the Visigoth in Spain, Gundebald in Burgundy, and Clovis in France, sought to systematize in legal form the rude usages and customs of their several peoples, and to establish, what in the language of modern diplomacy we might call a *modus vivendi* between the Romanic and the Teutonic elements of the population. As we have already stated, the result, in general, was to have two systems of law side by side and two sets of tribunals to administer them, each to some extent contending for the mastery. It is a peculiar fact that, in the history of these

early ages, numerous instances are cited wherein persons made public and formal renunciation of one system and adopted the other.

Theodoric's Code of Law for his Ostrogoths in Italy, promulgated in the year 500, which was 29 years before the promulgation of Justinian's great Code of the Roman Law, and which was based to a great extent on the previous Code of Theodosius II, seems to have been the first attempt to establish a system of law for any of the barbarian tribes. It was intended for the Ostrogoths only, and not for the Romanic part of the people, which was left in the enjoyment of the Theodosian Code; and yet it is a remarkable fact that it was wholly of Roman origin and contained scarcely a trace of Teutonic usage. It may be regarded as an attempt on the part of Theodoric to Romanize his Ostrogoths, an attempt which he is known to have favored in the earlier part of his reign, before he became the bloody tryrant which he afterwards proved himself to be; and the Code is generally conceded to have been the work of the learned Roman Cassiodorus, first a Senator, and afterwards an ecclesiastic, and eminent in both characters, and who was for several years the prime minister and chief adviser of Theodoric. The Code of Theodoric did not last long; nor did the Ostrogothic Monarchy. The turbulent Ostrogoths found it difficult to conform to any system of law: and both Code and Monarchy were overthrown by Belisarius and Narses, generals of the Emperor Justinian, about A.

D. 554. Thereupon the Code of Justinian became generally dominant in Italy.

The Lombards, another Teutonic tribe, who succeeded the Ostrogoths in Italy, and who came into the country in A. D. 568, it is said, at the invitation of Narses, and who held a large part of the Peninsula for about 200 years (A. D. 568-774), were among the most savage and brutal of all the Teutonic invaders. They yielded the palm of savagery only to the Anglo-Saxons of England. They, too, in course of time, under civilizing Roman influence, formulated a code of law, written in Latin, and yet almost a purely Teutonic code, and constituting merely a recital of rude Teutonic usages, under their King Rothari, A. D. 636-652. It was made, however, sharply to antagonize the Roman Jurisprudence; and it perished when the Lombard dominion was terminated by the Frankish monarch Charlemagne, in A. D. 774. Thereupon the Roman Jurisprudence wholly supplanted it.

Almost contemporaneously with the promulgation of the Code of Theodoric the Ostrogoth about A. D. 500, Alaric II, the Visigothic King of Spain, found it necessary to publish two codes of law for his people, one for his Visigoths, and the other for the Romanic Spaniards. Of the former we know little or nothing. The latter became known as the *Breviarium Alarici,* and the substance of it has been preserved. It was taken mainly from the work of Gaius, the great Roman commentator. Some of the successors of Alaric, however, sought to combine both

elements of the population by restricting, and even for a time prohibiting, the use of the *Breviarium,* and substituting in its place a compound of the Roman and Visigothic law known by the name of *Liber Judicum,* or *Forum Judicum,* Book or Court of the Judges, which became the basis of Spanish law for many generations. But both the Visigothic codes and the Visigothic monarchy were ruthlessly swept away in the bloody battle of Xeres, A. D. 712, by the fanatical Moslem from Africa; and when the tide of conquest was painfully and slowly rolled back, which it required upwards of 700 years to do, the distinction of Roman and Visigoth had utterly disappeared and been almost forgotten. In the mean time, however, and while the contest between the Moors and the revived Spanish monarchy was in progress, Alfonso IX, surnamed *the Wise,* King of Castille and Leon, promulgated an elaborate code of law, known by the name of the *Siete Partidos,* or Seven Chapters, which was simply an adaptation of the old Roman law and a practical return to the Roman system, and which formed the foundation of all subsequent Spanish law.

The Teutonic tribe of the Burgundians, who established themselves in Switzerland, Savoy, and that part of southeastern France which yet bears from them the name of Burgundy, were invited by the Romans as friends to come into the country at the very beginning of the great Teutonic movement about A. D. 413. They were the most civilized, or at all events the least barbarous of

all the Teutonic hordes that came into the Roman Empire. Arians at first, like the Ostrogoths and Visigoths, they very soon adopted the tenets of Orthodox Christianity, and became the most amenable of all the tribes to the influences of the Roman civilization. They, too, almost contemporaneously with the Ostrogothic and Visigothic legislation, adopted two codes, one for the Romanic population within their territory taken exclusively from the Roman institutions, and the other the special law of the Burgundians themselves, designated from the name of their king as the Law of Gundebald. It is almost unnecessary to add that both were prepared by the bishops who formed the council of King Gundebald. When the Burgundian monarchy was overthrown by the sons of Clovis about A. D. 534, and Burgundy became part of the Frankish monarchy, the Burgundian law of Gundebald became in great part amalgamated with the law of the Franks, and ceased to have distinctive importance.

The laws of the Franks deserve something more than a passing notice. The Franks or Freeman—for the words mean the same thing—were a combination of different Teutonic hordes rather than a single tribe, and seem to have come originally from the region afterwards known as Franconia, in Central Germany, to which they left their name, as they afterwards gave it to Gaul. They appear to have settled, or encamped, as the case may have been, on the Lower Rhine, in the region of Cologne and Luxemburg, when, under their energetic boy-king

Clovis, in A. D. 481, they advanced into the Roman province of Gaul, defeated the Roman commander Syagrius, and occupied all the northern and central parts of the country, which thereafter took from them the name of France. They were pagans when they crossed the Rhine; but after the great battle of Tolbiac in A. D. 496, in which Clovis defeated a powerful confederation of the South Germans against him, they became converts, nominally at least, to Orthodox Christianity, under the influence of the sainted Clotilde, the wife of Clovis, and daughter of King Gundebald of Burgundy. But what kind of Christians they were for more than a century afterwards, it is needless here to inquire too particularly. The inquiry would not disclose anything in these new converts of which Christianity had reason to be proud, although in the annals of the time there is mention of many illustrious men and women, mostly of the Romanized Gauls, who were distinguished for their virtue and their intelligence.

About the same time as the Ostrogoths, Visigoths, and Burgundians, the Franks found it necessary to systematize their social polity also and to formulate their rude usages into some semblance of law. Three Codes apparently were the results—the *Lex Salica* or Salic Law, the *Lex Ripuaria* or Ripuarian Law, and the *Lex Francorum Chamavorum* or the Law of the Franks of the Lower Rhine, of which the last mentioned was of limited application and soon ceased to be of importance. All, of

course, were compiled in Latin, which was the only literary language of Western Europe at the time.

The Salian Franks were the most powerful tribe in the Frankish Confederation; and they gave name to the Salic Law, which was their special law. This was the earliest code of Frankish law, as well as the best known type of all the barbarian codes; and it was the least affected by the Roman Law. It contains 408 articles or paragraphs, of which 343 are devoted to penal offenses, and only 65 are given to all other matters. Of the 343 penal clauses 113 are concerned with offenses against the person, and about 150 with robbery. Probably no more striking illustration of the character of the Salic Law, and of the Barbarian Codes generally, could be adduced than this simple enumeration. From it the conclusion plainly appears that the lives of these Teutonic barbarians were lives of crime, and that the civil affairs of life and the pursuits of peace had but little part in their daily history.

There are two features of the Salic Law which deserve especial notice. The first of these is the method provided in it for the trial of controversies, both civil and criminal. This was not by means of the testimony of witnesses as to the facts, but by means of what was called the ordeal or by compurgation. The ordeal was by fire or water, or by battle. You have an account of it in the early English Common Law, as stated by Coke and Blackstone; for this feature, which was common both to

the Common Law of England and the Salic Law of the Franks, was either derived from the latter by the former, or came from the same Teutonic source. The compurgation, which also found lodgment for a time in the Common Law of England, was by swearing; the man, who could bring the most witnesses to swear, not as to the facts in controversy, but that they believed he told the truth, was the successful litigant.

The other noticeable feature of the Salic Law, and which has actually perpetuated its existence to that extent to the present day is the absolute exclusion of females from inheritance, and not only from the enjoyment of the inheritance themselves, but also from any right of transmission of it to their descendants. This would seem to have been the general rule of the barbarians; but nowhere was it accentuated to the same degree as in the Salic Law of the Franks. It was rigidly adhered to in France down to the latest day of the French Monarchy with reference to the succession to the throne; and also very generally, although not invariably, with reference to the great fiefs, such as Brittany, Burgundy, Champagne, Lorraine, Provence, Toulouse, and others. It was adopted, and yet remains the rule also, in several of the German States. It is always referred to as the Salic Law; and it is the only distinctive feature of the Salic Law which yet remains in force.

It was mainly the Salic Law which the followers of William of Normandy carried with them into England;

but this special feature it was soon found expedient to repudiate. Henry I, the third Monarch of the Norman line, had no male children to survive him; and he desired to secure the succession to his daughter, the Empress Queen Matilda, whom he procured to be acknowledged by the nobles and bishops of the realm. But, as we know, she did not succeed in peace. Stephen of Boulogne usurped the throne, and in spite of many vicissitudes succeeded in holding it. But when Henry II, the first of the Plantagenets, came in as the son and heir of Matilda, it was necessary to establish the rule of the right of succession of females in the absence of male heirs. This departure by England from the original rigor of the Feudal Law, which was caused by its own special and selfish purposes, and not by any motive of humanity or sense of propriety, was unjustly made the basis of two long and brutal wars by England against France to secure the crown of the latter country for the Plantagenets, an attempt which fortunately failed.

The Ripuarian Law originated with the Ripuarian Franks, who dwelt near the Rhine, and whose chief city was Cologne. It was somewhat later in its formulation than the Salic Law; and it also shows more of the influence of the Roman Jurisprudence. Consequently it was an improvement in several respects upon the Salic Code. In the frequent divisions and subdivisions of the Frankish Monarchy in the times of the first or Merovingian Period of Frankish History, it became important in con-

sequence of its adoption by some of the successors of Clovis for their kingdoms; but it secured no permanence, and it would serve no good purpose for us here to enter into any details in regard to it.

It remains to be added, with reference to the Franks, that their kings never attempted, as did Theodoric the Ostrogoth in Italy, and the other barbarian kings who have been mentioned in their respective dominions, to codify the Roman Laws for their Romanic subjects, or to promulgate any laws for their special use. These were left to administer the Roman Law between themselves as best they could in their own tribunals. But it would seem that the Burgundian Roman Code, prepared as we have seen at the instance or under the authority of King Gundebald of Burgundy, was frequently used for a long time after him by the Romanic population of France.

The great reorganizer of Modern Europe came in the person of the greatest of all the Frankish monarchs, possibly the greatest and ablest public man of all time, imperial Charlemagne, the one man in all history whose very name imports greatness (A. D. 742-814). Charles the Great, or Charlemagne, became monarch of the Franks in A. D. 768, in conjunction with his brother Carloman; and upon the death of the latter in A. D. 771, he became sole monarch. From his father Pepin, and his grandfather, the famous Charles Martel, who had saved Europe and our Aryan civilization from ruin at the great battle at Tours in A. D. 732, against the terrible assault

of an overwhelming host of Mohammedans from Spain and Africa, Charlemagne inherited an extensive sovereignty. During his long reign of 43 years he so enlarged his Empire that it extended from the Baltic Sea and the Vistula on the northeast to the Pyrenees and the Ebro on the southwest, and from Cape Finisterre in Brittany to the mountains of Albania on the southeast and Benevento in Italy. In fact, he divided the civilized world with the Byzantine Empire, or Roman Empire of the East. In the year 800 the Pope and the people of Rome and of Italy, whom he had relieved from the scourge of the Lombard domination in that country, revived for him the title of Emperor of Rome, which continued to be borne for a thousand years by those who claimed to be his successors. From this revival of the Roman Empire may be dated the full revival of the Roman civilization, after a long night of over three hundred years of barbarism.

Alexander and Cæsar gained renown rather on the battle field than in the cabinet. Cæsar especially did nothing worthy of his confessedly great genius beyond the destruction of his country's institutions, if that can be called a worthy work. Charlemagne was no less great as a warrior; his very name was an assurance of victory on a hundred battle fields. He never encountered a reverse, and was the most forbearing and the most magnanimous of conquerors. But his great work was not the conquest or the enlargement of an empire, but the reconstruction

in Europe of the Roman Civilization, a gigantic enterprise in which the genius of Alexander and Julius Cæsar might have failed, probably would have failed. It cannot be said that even Charlemagne was entirely successful in it; for it was more than the work of one life-time, even though extending over 43 years, and he had no children or descendants worthy of himself to carry it on after him. In fact, his children and descendants dissipated their glorious inheritance in civil war and strife; and the Christian Church was again compelled to take up the work on its own account, and to carry it on by its own slow but certain processes. And yet the great work of Charlemagne was not without useful result to all succeeding generations. The prestige of his mighty name was ever associated with every effort to restore in after times the Roman Jurisprudence and the Roman Civilization.

Not only in his attempt to organize his great empire into a homogeneous whole and to establish peace and good order everywhere, was the genius of Charlemagne manifested, but also and perhaps principally in his effort to restore the principles of the Roman Jurisprudence as far as possible. His Capitularies, as they are called, or statutory laws enacted at the great annual meetings of the notables of the Empire, did much to harmonize and consolidate the racial distinctions that even then continued to exist; and while he wisely refrained from a complete abrogation of the ancient laws and Teutonic usages,

he ever sought to extend the scope of the ancient Civil Law of Rome. The Capitularies of Charlemagne were collected and published by one of his councilors, Angesius, abbot of Fontenelle. With some additions made in the reign of his son and successor Louis le Debonair, they amounted to 1697, that is, the laws were contained in 1697 chapters. Some subsequent additions increased the number to 2100. In these it was sought to blend and combine the Teutonic usage with the Roman Law; and while, as we now see it, the union was radically impossible, the combination was effective for the time, and under the influence of the genius of Charlemagne found ready acceptance throughout the new Empire. Many of the Capitularies, however, were local in their nature, that is, some were intended for the Franks alone, some for the Kingdom of Lombardy, and some for the Romans of Central Italy and other peoples closely attached to the old Roman institutions. It is unnecessary to enter into any detailed consideration of them. It will suffice to say here that the Capitularies of Charlemagne prepared the way for the Western World to return to the Jurisprudence of Rome, although the complete restoration was not effected for many ages afterwards.

CHAPTER VIII

THE CONTEST BETWEEN THE CIVIL LAW OF ROME AND THE "COMMON LAW" OF THE TEUTONIC BARBARIANS—Continued

The history of the Dark Ages, in the first instance, which we may regard as covering the period of time from Alaric to Charlemagne, and the history of the Middle Ages afterwards, which constitutes the period from Charlemagne to the Discovery of America, are scarcely more than a recital of continual contest between the Church and the State in Europe. The struggle was at one time between the Popes and the Kings of France to preserve the sanctity of the domestic relations and the inviolability of marriage from the assaults of Merovingian lust and Capetian licentiousness. At another time it was between Rome and the German Emperors on the subject of investitures, as they called it, that is, whether the bishops of the Church should be the mere creatures of the State, or should derive their authority from Rome and be practically free from the hated institution of Feudalism. Still at another time it was a contest between Rome and England's Plantagenet kings to prevent

the unlimited subjection of the bishops to the control of the monarch, which was finally prevented by the first article of Magna Charta, which provided that the church in England should be forever free. Everywhere and at all times it was a contest of the Church against the brigandage of the feudal barons. The contests was often obscured by side issues, by personal ambitions, even by excesses and lawlessness among churchmen, which however were rare, as well as by the excesses and lawlessness of feudalism, which were practically continuous; but no impartial or enlightened student of history can now fail to see that it was always and essentially a contest between Roman Civilization and Teutonic Barbarism, between the people struggling to be free and the grinding despotism of a dominant and ignorant oligarchy, between principle and privilege, between law and lawlessness, between the religion of Christ and the religion of Odin. It was the struggle between intellect and brute force; and the ultimate result of such a struggle can never be doubtful, although humanity shudders at the price which it has been compelled to pay for the ultimate triumph of truth and justice and human liberty. In the insular bigotry of their prejudices and their slavish submission to their own despicable form of Feudalism, many English writers have wilfully misrepresented the nature of this conflict; but all intelligent men now appreciate its true character.

Feudalism was established throughout all Central,

Southern, and Western Europe. Even Germany itself, where it might have been supposed that the institution was not needed, yielded to the general influence; and Eastern Europe sunk into a similar slavery. Only in the great Byzantine Empire, which survived the wreck of the Roman dominion, and in some of the cities of Italy, was the spirit of Roman liberty perpetuated. Free Venice on her little islands of the Adriatic never yielded to a foreign conqueror, and preserved the Roman institutions. Genoa, Milan, Florence, Pisa, and Amalfi threw off the hated yoke. Rome itself, although it often received the Northern invaders within her gates, never once abjured her allegiance to the Roman Law. Every town and city, that became the seat of a bishop of the Christian Church, became at the same time a place of refuge for the Roman spirit and a centre for the propagation of the principles of human liberty. Under episcopal and ecclesiastical influences, not only the great cities of Italy, but also those of the Rhine, as well as the famous Hanse towns of the Baltic, reasserted the Roman principles and revived the Roman Jurisprudence.

The reaction was permanent. It seems to have been greatly stimulated in the Twelfth Century by the discovery of a complete copy of the Institutes of Justinian at Amalfi in A. D. 1137, although why this discovery should have had such effect is not quite apparent, since commerce with the Byzantine Empire was still open for the Italian cities, and the study of the Roman Law

had never ceased in the Peninsula. The famous University of Bologna, the first of the great universities of the modern world, had always continued to teach the Roman Jurisprudence; and Bologna remained for many a century and even down to very recent times the great nursery of the principles of Roman liberty in Italy. But it is certain at all events that, whatever may have been the reason for it, the discovery of the Institutes of Justinian at Amalfi gave a great impetus to the study of the Roman Law. The young Italian republics were then starting upon their wonderful career of development; and they all made the Roman Jurisprudence the basis of their institutions. The free cities of the Rhine followed their example. Even the great Feudal monarchies of France and Germany felt the influence. Feudalism stubbornly and sullenly contested every inch of the ground which it was compelled to surrender; but it was unable to withstand the onward march of human civilization.

Fortunately, as already intimated, there were various extraneous causes which aided the great movement. First in the order of time was that of the Crusades, which lasted over a period of about 200 years, A. D. 1096-1270. Many of the feudal barons went into the Crusades, and fortunately for the cause of humanity, many of them never returned. Many of them enlarged the privileges of the mercantile communities subject to their jurisdiction in order to raise money for their expeditions; and the privileges remained permanent. In more

ways than one did the Crusades, magnificently intended and most atrociously managed as most of them were, prove a benefit to humanity. The heroic King of France, Louis IX, known as St. Louis, who conducted the last two of them, also deserved the credit of an able and wise legislator, who did much to improve the laws of his country, and who, among other reforms, abolished the ordeal and the trial by battle in France, customs which, as we have seen, had come down from the law of the Salian Franks. The "Establishments" of Louis IX, as they are called, were worthy to supplement the Capitularies of Charlemagne; and the Law of France, as formulated by him, remained practically unchanged until the time of Louis XIV. It is almost needless to add that the "Establishments" of King Louis IX were the direct dictates of the Roman Civil Law, and were superinduced by Roman influences.

The subject of the Roman Jurisprudence was ever kept alive and active by the fact that the Christian Church had in a measure adopted it as her own. For it was from the Roman Civil Law that the Canon Law of Christian Rome was evolved. In the age of comparative freedom for the Church which followed from the accession of Constantine the Great to the Downfall of the Empire of the West, this evolution had gone on, and had increased in volume according as the power and influence of the Church had increased. In a certain sense the scope of this power and influence became greatly en-

larged and vastly enhanced after the overthrow of the Empire, by reason of the fact that the Church was then called upon to protect the people against oppression and wrong by the barbarian conquerors, and by reason of the further fact that very soon afterwards the bishops of the Church were compelled by the force of circumstances to assume a large amount of temporal power and even to become princes and potentates equal, and often superior, to the greatest feudal nobles. Many subjects were drawn within the cognizance of ecclesiastical law, some exclusively so, which previously had been more or less controlled by the civil authorities; and locally the bishops had their own courts wholly independent of the feudal tribunals. Even when the bishops held both classes of tribunals, as they often did, they were always careful to maintain the ecclesiastical jurisdiction separate from the ordinary civil power. Thus it was that the subject of marriage, the civil conduct of the ministers of the Church, the disposition of property granted to the Church for its uses, and various other analogous matters, were withdrawn from the feudal authority and subjected exclusively to the ecclesiastical jurisdiction. Then the monasteries and convents, which became numerous and were veritable republics, in fact the first constitutional republics within the feudal territory, sharply antagonized the tenets of Feudalism. All this caused a remarkable development of the ecclesiastical law, and naturally enough on the lines of the Civil Jurisprudence of Rome.

And thus was the Roman Canon Law developed by successive popes and bishops and councils of the Church, as the Roman Civil Law had been developed by the praetors and commentators.

So, too, when the Canon Law, like the Civil Law, had become voluminous and required to be systematized, the work of Gaius, Papinian and Thebonian was paralleled by the learned Gratian of Bologna for the Church in A. D. 1150. From a mass of detached regulations Gratian produced a single, consistent, and easily accessible commentary on the whole ecclesiastical law, to which the title of *Corpus Juris Canonici* (Body of the Canon Law) was afterwards given, as the title of *Corpus Juris Civilis* (Body of the Civil Law) had previously been bestowed on the great work undertaken by the order of Justinian. The City of Bologna, where Gratian taught, remained for many ages the great school of both; and it has been noted that it was its famous university which first conferred the degree of Doctor of Laws (LL.D.) meaning Doctor both of the Roman Civil and of the Roman Canon Law.

It was rather indirectly through the Canon Law than directly of its own force that the Roman Jurisprudence first succeeded in checking the progress of Feudalism and subsequently in subverting the system. The Canon Law was the immediate weapon of the Church wherewith to antagonize the barbarian usages of Feudalism.

A further development of the principles of the Roman Law through ecclesiastical influence was in the matter

of the disposition of personal property upon the decease of the owner. Originally, as it will be remembered, the feudal tenure was only for life. Upon the death of the occupant every feudal holding reverted to the feudal lord. When the right of inheritance was introduced, it only applied to real estate. In fact, in our system it only applies to real estate now. There is usually no such thing as inheritance of personal property, except as to the things regarded as heirlooms. Personal property continued to be seized and appropriated by the feudal lord. It is true there was usually not much of it within the domain and the sphere of action of Feudalism. Cattle and agricultural implements constituted the bulk of it. But what little there was became the spoil of the feudal lord as soon as the owner had been called away by death; and wife and children were ruthlessly deprived of the support which it might have been to them. It was a case of brutal oppression and wrong, under the form of law, if the word *law* is not desecrated by the application to the infamous usage, which justified the most forcible intervention on the part of the ecclesiastical authorities. Appeal was made to the conscience of the feudal lord. Perhaps, there should be an apology for the use of the word *conscience* in any such connection. At all events, the thunders of the Church were invoked against the feudalist who insisted upon the exercise of his feudal prerogative; and the Church finally succeeded in getting the personal property of deceased persons into

its own possession for the benefit of their families and relations. Thereupon, each ordinary or bishop within his own diocese, immediately upon the happening of a death, became the lawful custodian and administrator of all personal property within his territorial jurisdiction. The administration he committed to competent persons as each case arose; and he himself only retained the jurisdiction to see that it was properly conducted.

On the continent of Europe, with the revival and extension of the Roman Law, this ecclesiastical jurisdiction ceased at a comparatively early date. In England it continued to be the usual system down even beyond the middle of the last century. The administration of the personal estates of deceased persons was no part of the Common Law of that country; it belonged to the ecclesiastical authorities. The courts for that purpose, courts of probate, as they have been called, because they take the probate of wills for the transmission of personal property, were the courts of the bishops; and the law administered by them was notoriously the Canon, and the Civil Law of Rome. The custom has left its impression upon our American law. For, although our ancestors brought with them what is called the Common Law of England, and although they could not, and did not bring with them the bishops and ecclesiastical courts, and were compelled immediately to supply the deficiency by the establishment, through the instrumentality of statute, of special courts for the purpose, generally known through-

out the country either as Orphans' Court or Courts of Probate, it is a curious fact that the law which they administer is and always has been the Roman Law. A remarkable illustration of it is the fact, that, our laws for the distribution of personal property are purely those of the Civil Law of Rome. We have retained the tradition of the ecclesiastical jurisdiction; and in the exercise of this jurisdiction the bishops were unfettered by feudal restraint.

With his usual misrepresentation, and even deliberate mendacity, for he knew better, where the Church was concerned in her relations to the feudal power, Blackstone wishes us to believe that the Kings voluntarily surrendered their right to the personal property of those who died intestate to the ordinary or bishop for proper distribution of them, that the ordinary was often recreant to his trust, and that it required two statutes, one of 13 Edw. I., Chap. 19, and the other of 31 Edw. III., Chap. 11, to compel him to execute the trust properly and to depute the administration to the next of kin or some near friend of the deceased. A careful consideration of these statutes and of the circumstances under which they were made will show that the great commentator has wilfully misrepresented their tenor and import, and that they were enacted at the solicitation of the bishops themselves for the purpose of having a uniform law throughout all England. There was no question in them of breach of trust on the part of the bishops or ordinaries;

and even if breach of trust there had been, of which there may well have been individual instances, the fact does not militate against our contention that the ecclesiastical action in rescuing personal property of deceased persons from the grasp of the king or feudal lord was a check to Feudalism and a revival to that extent of the principles of the Roman Law.

There was also a great enlargement of the application of the principles of the Roman Law in the revival of commerce consequent upon the growth of the Italian republics and the great free cities of the Rhine and the Baltic Sea. The Teutonic barbarians had destroyed the commerce of Europe outside of the Byzantine Empire. Those bandits had no use for commerce. They infested the sea, at least some of them did, as well as the land, but it was only for the purpose of piracy. They were pirates at sea, and highway robbers on land. But when the reaction commenced in Italy, and the Italian republics grew and prospered and devoted themselves to trade, and the merchant fleets of Venice and Genoa and Pisa and Amalfi traded with the Byzantine Empire and the Levant, and especially after the Crusades had given an impetus to the trade of the Mediterranean, legislation was needed for the regulation of commerce, and the principles of that legislation was found in the Roman Law, which itself is conceded by the Roman writers to have borrowed them from the Rhodians. Three noted codes of maritime law were form-

ulated in Europe during the three centuries between A. D. 1000 and A. D. 1300—one, Il Consolato del Mare, which was adopted by the cities on the Mediterranean; the second, the Laws of Oleron, which prevailed in France and England; and the third, the Laws of Wisby, which governed the great free cities of the Hanseatic League on the Baltic.

The oldest of these codes was the Consolato del Mare, or Regulation of the Sea, prepared either at Barcelona, in Spain, then as now the principal sea-port of that country, or at Pisa, in Italy, which at that time constituted with Venice and Genoa the great trading cities of the Italian peninsula. The date of its first promulgation is not known; but it preceded the First Crusade, which was commenced in A. D. 1096. It was a compilation of comprehensive rules for all maritime subjects, without much order in its plan, but marked by a most liberal and equitable spirit. It dealt with the ownership of vessels, the duties and responsibilities of the masters or captains thereof, duties of seamen and their wages, freight, salvage, jettison, average contribution, the rights of neutrals in time of war—in fact, with all the subjects that now enter into the admiralty and maritime law of all civilized nations; and its principles have been universally adopted by the nations. It was not the oldest of the Mediterranean codes of the Middle Ages with which we are acquainted. It had been preceded by one prepared at Amalfi, when Amalfi was the most famous

of Italian seaports, and which was known by the name of the Amalfian Tables; but the Amalfian Tables were superseded by the Consolato del Mare, and the latter became and remained the maritime law of the Mediterranean through all the period of the Middle Ages, and down even to comparatively recent times. Both were confessedly based upon the Roman Civil Law. Feudal usage contributed nothing to them, but its antagonism and enmity; and they were radically at variance with the tenets of Feudalism.

The Consolato del Mare inspired the second great code of maritime regulation, the Laws of Oleron, which are supposed to have been compiled about A. D. 1150. It is generally understood that we owe them to a woman, Eleanor, Duchess of Guienne, Queen first of Louis VII of France, who procured a divorce from her, and afterwards of Henry II of England, the first of the Plantagenets. The statement is, that, when she was in the East whither she accompanied her first husband, the King of France, on the Second Crusade, she became acquainted with the Consolato del Mare, which was then dominant in the Levant, and being struck with its adaptability for use by the people of her own Duchy of Guienne, who were largely engaged in the Atlantic coast trade at the time, caused it to be recast and enlarged, and promulgated in the little island of Oleron, off the coast of Guienne, then the centre of the commerce of Southwestern France. It was soon adopted both in France and England under

the title of the Laws of Oleron, by which name the compilation is known to this day. It is said to have been introduced into England either by Eleanor herself or by her son Richard Coeur de Lion. With more or less modification it is the maritime law of the civilized world today. If Eleanor of Guienne inspired or compiled the Laws of Oleron, or caused them to be compiled, it is greatly more to her credit than anything else history tells us in regard to her. But she is more likely to have been instrumental in the performance of the work than her utterly worthless and profligate son, Richard.

Third in the order of time of the three great maritime codes of the Middle Ages were the Laws of Wisby, compiled about A. D. 1288. Wisby was the capital city of the island of Gotland, in the Baltic Sea, and was the common metropolis of the famous Hanseatic League, a confederation of the great cities of the North, commenced by Lubeck, Bremen, Hamburg, and Dantzic, and at one time comprising over seventy cities, including several in the heart of Germany, as Brunswick, Frankfort and Cologne, and some even in distant Russia, such as Novgorod. This league was commenced about A. D. 1250, or according to others as early as A. D. 1164. Its object was mutual protection against pillage by land and piracy by sea, against the robber barons of Germany and the pirates of Denmark and Norway. It sharply antagonized the Feudal system on the one side and the buccaneers of the Northern Seas on the other side. The league

was both offensive and defensive, and provided for a mutual intercommunication of rights and privileges, including the right of citizenship. To avoid controversies with each other as far as possible, they provided for a code of Maritime Law, which was promulgated at Wisby and which followed closely on the lines of the Laws of Oleron and the Consolato del Mare, and in fact was in great part taken from them. This code was amended and enlarged on several occasions afterwards, and received its final form in a congress of the cities which met at Lubeck in 1614, and which promulgated what is known as the *Jus Hanseaticum Maritimum,* or the Hanseatic Maritime Law. The League was then however in its decay. Only three of its cities maintained their independence to the Nineteenth Century, when they were compelled to enter the new German Empire. These were Hamburg, Bremen and Lubeck. While it lasted, the Hanseatic League was a powerful opponent of the Feudal System; and its system of Maritime Law contributed greatly to the subversion of the rude usages of Feudalism.

It remained for France and for the reign of King Louis XIV to bring the Maritime Law of the world to perfection, still on the lines of the three famous codes which have been mentioned and in the development of the Roman Jurisprudence. Two ordinances, one published in A. D. 1673, and the other in A. D. 1681, under the influence and the superintendence of the illustrious Col-

bert, one of the secretaries of state and minister of marine for King Louis, covered the whole range of the Maritime and Commercial Law, embodied all that was of substance in the Laws of Oleron, the Laws of Wisby, and the Consolato del Mare, and superseded them all. They were so just, so wise, so complete in all their provisions, that they almost immediately received universal acceptance; and all the Commercial, Maritime, and Admiralty law of the civilized world to-day is based upon them. And this Commercial, Maritime, and Admiralty law is a part of the Law of Nations universally administered by the courts of all the civilized nations substantially in the same manner, upon the same principles, and with the same forms of procedure. It was introduced and applied in England by Lord Mansfield in the year 1760. (See the case of Luke v. Lyde, 2 Burrow, 882.) It is also our maritime law in America.

It is very apparent how impossible it was for Feudalism to flourish in the atmosphere of this Maritime Law, and how greatly the influence of the Feudal System must have been undermined by its extension. The contrast between the two was an object lesson for the nations, the effect of which was not lost upon the people.

Let us turn for a moment to Germany. A curious phase of the conflict of the Feudal System with the Roman Jurisprudence was manifested in the history of Germany in the Middle Ages. Strange as it may seem, in view of the causes that originated the Feudal System,

that institution received its greatest development in Germany. But Southern and Western Germany had been fully Romanized; and the Romanized Germans fell a prey to the savagery of their Teutonic barbarian kindred, equally as did the Gauls and Spaniards and Italians. There was no brotherhood or patriotism or sense of nationality among these barbarians; there was no bond of unity other than the same indiscriminate desire to murder and to plunder. By conquest and by assimilation Germany also, as well as Spain, Gaul and Italy, fell under the influence of the Feudal System, and even to a greater and worse extent than the other nations, since the sentiment of nationality among the Gauls, Spaniards and Italians served also to develop the same sentiment among their barbarian rulers, while the Germans had not then, and never have had since, any similar spirit, and their only bond of union, a most weak one, was that of race. The result was that the geographical expression, which we call Germany, was divided into a thousand petty principalities under as many irresponsible feudal rulers. Even when upon the partition and breaking up of the great Empire of Charlemagne, the imperial title fell to Germany, the Emperor was without power to check the feudal princes and the feudal barons within their own petty dominions; and consequently Germany remained the most complete exemplar of the Feudal System, and there are more remnants of the system to-day in that country than anywhere else in Europe.

It was sought in course of time to check the excesses of the system by the establishment of a secret and irresponsible tribunal, which was established in Westphalia about the year 1179, and which was known by the name of the Vehmgerichte, or Secret Tribunal. Of the origin and history of this tribunal little is known. It was an irregular tribunal, with no legal warrant for its existence, which proceeded upon what were deemed to be the natural principles of justice to stop oppression and wrong. Its sessions were secret, its members were unknown, its mandates were executed with the greatest secrecy. It lasted for about three hundred years; and it certainly had a wholesome influence in curbing the lawlessness of the robber barons. Such a tribunal, of course, could have continued existence only in a state of society where violence and lawless passion were dominating factors in the ordinary affairs of life.

But with the establishment of Feudalism in Germany there were planted at the same time the germs of the Roman system. Nowhere in Europe did the bishops and priests of the Church acquire so great influence in temporal affairs as they did in Germany. Many of them became princes of the Empire and practically independent in the management of the affairs of their own several dominions. The bishops of Cologne, Treves, Mayence, Munster, Magdeburg, Paderborn, Osnabruck, Hildesheim, Bremen, and Lubeck, attained to sovereign power. The chiefs of monasteries and convents also, ab-

bots and abbesses, became rulers of petty independent states. So that, about the end of the thirteenth century, there were more than one hundred ecclesiastical sovereign states within the limits of the German Empire. Now we can readily infer what all this means in the contest between Feudalism and the Roman Jurisprudence. The bishops were nurtured in this latter system, they were hostile to the usages of Feudalism, they had no desire to perpetuate the sway of their own families. Consequently in all the ecclesiastical states the principles of the Roman Jurisprudence were to a greater or less extent introduced or restored. And precisely the same thing happened with the great Free Cities of the North, known as the Hanseatic League, to which we have already referred.

All these things contributed to establish the Roman System side by side with Feudalism in Germany and to perpetuate it. Even the transfer of the imperial title to the German monarchs, and the frequent visits of the German Emperors to be crowned at Rome, together with the sentimental desire on their part to revive not only the Roman Empire, but all the incidents of that Empire, including therein of course the Roman Jurisprudence, were powerful factors in the revival of the principles of the Roman Law in Germany. The Lutheran Reformation checked this movement by the enlargement of the powers of the petty feudal princes, who, in consequence of it, became absolute monarchs within their own domin-

ions, and found the usages of Feudalism more in accordance with their selfish purposes than the principles of the Roman Jurisprudence. But the free spirit which first found vent in our American Revolution, and which speedily reacted upon Europe, ultimately leading to the French Revolution of 1789, began also to make headway in Germany about the same time, and led to the promulgation of new codes of law both in Prussia and Austria, mainly upon the lines of the Roman Law, and ultimately to the adoption of the Code Napoleon, by all the States of Germany.

There is yet another phase of the great contest. In the course of it the Christian Church laid the foundations of modern International Law. Private International Law, as it has been called, or the Conflict of Laws, as it has sometimes been known, had been very fully developed by the Praetor Peregrinus at Rome in the administration of justice between Roman citizens and foreigners domiciled at Rome, and in controversies between foreigners themselves of different nationalities; and modern civilization has added little or nothing to the rules of the Roman Law upon this subject. But it was reserved for the Christian Church of the Middle Ages to deal with the nations as nations, and to procure them to deal with each other as members of the common family of States, upon principles of equity and justice, and in accordance with the tenets of Christianity. Feudalism was no more than organized brigandage; and it tended to make every na-

tion, and every petty principality, and every man, the enemy of every other nation, and principality, and human being. Feudalism was a state of society, in which every man capable of bearing arms may be said to have slept upon his arms, ever ready to be roused to the sound of battle, and in which every alien was regarded *prima facie* as an enemy. The Christian Church ever sought to superinduce a kindlier feeling, to induce the nations to refrain from border warfare, and to submit their controversies to arbitration; and many a controversy between nations in the Middle Ages was submitted to the Roman Pontiff as arbitrator. We may recall one famous controversy towards the end of the period, which is most interesting to us as having reference to our own America.

At the end of the fifteenth century, when Columbus had just discovered America, Spain and Portugal led all the nations of Europe and of the world in maritime enterprise. While the great Genoese, and Alonzo de Ojeda, and Amerigo Vespucci, and other famous adventurers, were engaged in the discovery and exploration of a new world for Castille and Leon, Bartholemew Diaz, in the services of Portugal, pushed southward along the coast of Africa and doubled the Cape of Good Hope, being the first to do so since the time of Pharoah Necho, King of Egypt. Following in his wake, the great Portuguese navigator, Vasco de Gama, sailed through the straits of Mozambique, plunged boldly into the unknown wastes of the Indian Ocean, and reached the coast of Hindustan.

A controversy arose between Spain and Portugal as to their respective spheres of action and their dominion over the discovered region beyond the Ocean. The controversy was submitted to Pope Alexander VI as arbitrator. Drawing a meridian line north and south some distance west of the Azores, the Pontiff allotted all the discoveries west of that line to Spain and all east of it to Portugal. It so happened that a few years afterwards, in A. D. 1500, the Portuguese navigator Pedro Alvarez Cabral, bound on a voyage to Hindustan, was driven out of his course by a storm on the west coast of Africa, and came on the shores of Brazil. The land which he discovered was east of the meridian line drawn by Pope Alexander, and became Portuguese territory, while elsewhere to the west the power of Spain became dominant. The arbitration was a notable one; it was readily accepted by both parties; and it removed for all time all danger of conflict between Spain and Portugal in respect of their maritime enterprises and colonial acquisitions.*

Grotius, Puffendorff and Vattel, the great writers upon International Law, merely took up the theories of

*Note.—The action of Pope Alexander VI, who has sins enough for which to answer without the imputation to him of sins of which he is not guilty, has been shamefully misrepresented by various writers who knew better, as an attempt on his part to give the islands of the sea, as though he claimed dominion over them, to Spain and Portugal. The act of the Pope, as is very apparent from the documents themselves in which the controversy was stated and decided, was purely and simply an arbitration, and not an evidence of any assumption of papal ownership or authority over these trans-Atlantic lands.

the Roman Pontiffs and elaborated them into regular treatises on the subject. Papal rescripts and papal action had already done the work which these writers sought to expound. However much its sources may be ignored by those who have written upon it, the fact is patent that modern International Law is the result of Christianity and Papal influence throughout the Middle Ages, and that without these influences the evil genius of Feudalism would have made it impossible.

The renaissance of literature and the discovery of America sealed the doom of Feudalism; although to a certain extent, in the bitterness of the strife engendered by the Lutheran Reformation, it received a new lease of life and was enabled for a time to throttle the growing spirit of liberty. In the 250 years from the outbreak of the Reformation to our American Declaration of Independence, it struggled fiercely to restain its existence and its supremacy; but the struggle was in vain. Day by day and year by year, notwithstanding occasional triumph, or what seemed to be such, the institution decayed, and the spirit of liberty re-asserted itself, and the Roman Law gained ground. Strangely enough, the final overthrow and destruction of Feudalism were due to no less a personage than the famous Corsican conqueror Napoleon Bonaparte. The institution had its origin in blood and slaughter; only, it would seem, by blood and slaughter could it have been finally extirpated. It had been established in antagonism to the jurisprudence and the

freedom that had emanated from Italy; by an Italian it was its destiny to be overthrown.

When we recall the evil deeds of Napoleon, his crimes against humanity and human liberty, his crimes against religion, his intense selfishness, let us not forget at the same time that the world owes him an enormous debt of gratitude for that he was the most potent instrument in the hands of Divine Providence to wipe out the barbarous institution of Feudalism. He has been sometimes called the modern Alaric, as though his mission, like that of the ruthless Visigoth, was only to subdue and to destroy, to work ruin and desolation. Not such was the mission of the famous Corsican; for he undoubtedly had a mission. But it was to undo, not to parallel the work of Alaric and his fellow-barbarians. It is true that it was in part a mission to destroy; it required fire and sword to extirpate the baneful institution which the barbarians had foisted upon Europe. But it was also a mission to reconstruct and rebuild the edifice of Civilization, and fully to restore the Roman Jurisprudence. The thoughtless multitude remembers him only for his wonderful victories on the battlefield; the thoughtful few will see in those victories only a means to an end divinely appointed. The most admirable quality of the man was the wonderfully constructive genius wherewith he reared anew the temple of the Roman Law.

The famous adventurer had no sooner seized the imperial crown of Charlemagne than he undertook to com-

plete the partially unsuccessful work of that great monarch, and to remodel the jurisprudence as well as the political institutions of Europe. He appointed a commission of able jurists to prepare a code of law for the French Empire to take the place of the more or less disjointed ordinances and regulations that had served for law in the previous monarchy; and he directed them to take the Code of Justinian as the basis of their labors. It is known that he himself, amid all his vast enterprises, found time to participate in their councils, to supervise the work in person, and even to dictate many of its provisions. Whatever bad pre-eminence the unhallowed prerogative of having been the greatest warrior of all time may have given him, Napoleon Bonaparte equally deserves the credit, which he has not sufficiently received, of having been one of the greatest and wisest of human legislators. The laurels of Marengo withered long ago; and the sun that blazed in glory upon Austerlitz went down in blood forever on the fatal field of Waterloo. But the Code Napoleon not only survived the downfall of its author, not only remained the law of France for which it was chiefly intended, but was adopted as their own by all the nations which caused his overthrow, except England.

Never was triumph more complete than that of Napoleon in his Code of Law. An exile from his country, a prisoner on a lonely and distant island in the Southern Ocean, his power broken, his empire shattered to frag-

ments, Napoleon Bonaparte had the satisfaction of feeling that he had legislated not less for all Europe than for France, and that the combined world could not shake off his empire of the law. From Moscow to Madrid the Code Napoleon is now the basis of every system of jurisprudence on the Continent of Europe. It has been adopted by all Spanish and Portuguese America, and by our own State of Louisiana; and no country that has adopted it has ever manifested the slightest desire to abandon it and to return to the common law born of Feudalism. Most remarkable of all, when that wonderful island Empire of Japan burst suddenly the cerements of its ancient Feudalism and blazed like a newly formed star in the political firmament, taking its stand in the foremost ranks of modern civilization, while it copied enthusiastically the political institutions of England and America, as far as it was possible for it to do, yet it did not seek to replace its own feudal jurisprudence—for Japan also had its own feudalism—with the effete feudalism of Europe and the incoherent and insufficient system of the Common Law born of Feudalism. It turned instinctively to the Code Napoleon for instruction, and not to the so-called Common Law of England and the United States, which it only examined to repudiate. The preference of the Island Empire for the Jurisprudence of Rome is conceded by those who have given the subject careful consideration to be not the smallest evidence of the consummate sagacity of the leaders of the Japanese movement for progress.

With the exception of England and the United States —and we may see in the sequel that even the exception may have to be greatly qualified, or wholly abandoned— the Code Napoleon now governs the civilized world, of course with more or less qualification on account of local circumstances. And this means, that, after the long contest of thirteen hundred years from the downfall of the Roman Empire to the French Revolution, the Roman Jurisprudence is again triumphant, and the descendants of the barbarians have unreservedly accepted the Roman Law.

It may be added that the Code Napoleon is a model of condensation and brevity. It comprises, in fact, five codes: The Civil Code; the Code of Civil Procedure; the Code of Commerce; the Code of Criminal Procedure; and the Penal Code. The first named, the Civil Code, which is the most important, is that which is specially designated as the Code Napoleon. It is comprised in three books, with appropriate titles or chapters; of which the first book treats of persons, the second of property and its different modifications, and the third of the different methods of acquiring property. This first Code contains 2281 Articles and, therefore, in the matter of brevity, compares most favorably with the Code of Justinian and our various American Codes of Law.

Thus it was that on the Continent of Europe the contest went on for fourteen hundred years between Teutonic Feudalism and the Roman Civilization, between the

rude usages of the barbarians and the Roman Jurisprudence, between the military tyranny of an oligarchical minority and a people struggling to be free. The same contest was waged all over the Continent from the Vistula to Cadiz, everywhere with the same alternations and the same ultimate result. Throughout its history liberty and the Roman Law were synonymous terms, as were Feudalism and tyranny. Ignorance and illiteracy were on the side of the feudal barons; all the education of the time on the side of the people, and of the Church which championed the cause of the people. The feudal classes never produced a scholar, never a statesman, except Charlemagne; and he seems to have had Gallic or Gallo-Roman blood in his veins. It was not strange perhaps that Feudalism received the commendation of Sir William Blackstone and men of his class; for the spirit of Feudalism was dominant in England in his time. At this day we can better appreciate the character of the institution and its results, and the nature of the contest between it and the principles of the Roman civilization.

CHAPTER IX

THE RELATION OF THE CIVIL LAW OF ROME TO THE COMMON LAW OF ENGLAND

England and the United States have in a measure been excepted from the otherwise universal concurrence of all the civilized nations of the world in the acceptance of the Code Napoleon, or of the Civil Law of Rome in some shape, as the basis of their jurisprudence. Possibly at the present time the exception will be found more apparent than real, especially as regards ourselves.

In the great turmoil of the disruption of the Roman Empire by the Teutonic barbarians, what of Britain? The country was then called Britain, as will be remembered, and not England. This is a later appellation. And it was inhabited by a branch of the great Celtic Race, which had peopled all of Western Europe,—Romanized and civilized by four centuries of Roman occupation. The barbarians broke into Britain too; and ruin and desolation marked where the Anglo-Saxon savages came. Populous cities disappeared, or shrank into miserable villages. Fertile fields became barren wastes; commerce died; the Roman Civilization perished, and for two

hundred years and upwards barbarism reigned supreme over Britain. Even the very name of the country was lost for several ages, and when the island emerged again from darkness into the morning twilight of a feeble civilization, and became sufficiently self-conscious to require a new name, it received that of England.

The predatory bands, composed of tribes bearing the various names of Angles, Jutes, Saxons and Frisians, and known to subsequent ages by the composite appellation of the Anglo-Saxons, who swarmed to Britain from the shores of North Germany during the fifth and sixth centuries of our Era (A. D. 483-586), under the leadership of Hengist and Horsa, and other chiefs, first to help the Britons against their northern enemies from Caledonia, the Picts and Scots; and afterwards treacherously to turn upon their allies, and to plunder, massacre, exterminate or expel the unwarlike Britons from their homes, were easily the worst, the most savage, and the most bloodthirsty of all the barbarians who overran and dismembered the Roman Empire. Franks, Goths, Vandals, and even the Huns, must yield the palm of savagery to the Teutonic invaders of Britain. To this effect is the unanimous testimony of all the historians of the time; and their own historians, when they became civilized enough afterwards to have historians, never sought to deny the fact. Sad confirmation is found of the bloody story in the condition of the country when Christianity and civilization were again introduced from Rome

as contrasted with the flourishing state of Britain before the withdrawal of the Roman legions and the advent of the invaders from Germany. A recent English writer has given some reasons for believing that, in consequence of the ruin and devastation wrought by these intruders, even the great city of London,—for comparatively a great city it was even in the old Roman times—was for a time wholly abandoned and without inhabitants.

But the Anglo-Saxons, with all their savagery, had great possibilities in them. "*Non Angli, sed Angeli, si modo Christiani*"—"not Angles, but Angels would they be, if they were only Christians"—said Pope Gregory I, of some of them who had been brought to Rome; and forthwith he sent Saint Augustine and some zealous companions in A. D. 596, to convert the people to Christianity, which after many difficulties they succeeded in accomplishing. Further on their seven petty kingdoms, known as the Heptarchy, were united under one sovereignty by King Egbert of Wessex (A. D. 827), and the Kingdom of England began, which lasted for about 240 years (A. D. 827-1066) under a line of Anglo-Saxon monarchs descended from Egbert, who, however, had to contend frequently for their thrones with a cognate race of invaders, the Danes, and occasionally even to yield the sovereignity of the island to them. The Danes were as ruthless as had been the Anglo-Saxons themselves; and they left a lasting impression on the population of England, and on the laws, manners, and customs of the country.

Two great monarchs of the Anglo-Saxon line were eminent as legislators, Alfred the Great (A. D. 871-901) and Edward the Confessor (A. D. 1043-1066); and one of these, Alfred, seems to deserve the character which he has generally received from impartial historians of having been one of the most perfect civic personages in all the annals of time. Apparently only nine such personages can be enumerated, and Alfred is not the least illustrious among them. To Alfred has often been attributed the institution of trial by jury. He did not institute it. It had no existence in England for more than two hundred years after his time, when it was introduced by the Normans, who themselves had derived it from the Franks. (See Pollock and Maitland, History of English Law, Second Edition, Vol. 1, Ch. 6.) But he is known to have done much for the jurisprudence of his country. He borrowed much from the Brehon Laws of Ireland; and no doubt in his visit to Rome in A. D. 855, he had learned something of the Roman Civil Law.

Edward the Confessor had spent much of his early life on the Continent of Europe, an exile from his native country; and the Civil Law of Rome was then making rapid strides for its rehabilitation. He obtained the reputation in after times of being the great lawgiver of his country. Whenever during the Norman and Plantagenet periods the people were oppressed or became dissatisfied with existing conditions, their dissatisfaction always found expression in a demand for the restoration of the

laws of the sainted Edward. It is not quite apparent what these laws were for which they clamored; and it seems to have been no more than the popular fancy to attribute to him and to the great Alfred the enactment of much legislation which did not exist in their day, and so to attribute it merely as a ground for its introduction. But whatever either Alfred or Edward did for the improvement of the Anglo-Saxon jurisprudence, they had but two sources from which to draw inspiration, the Civil Law of Rome and the Brehon Law of Ireland; and upon both they seem to have liberally drawn. The Common Law of England, as they had it in the days of Coke and Blackstone, had but little existence in the Anglo-Saxon period of English history.

The institution of Feudalism, which was the foundation of the Common Law of England, as well as of all the Common Law systems of Europe, opposed to the Civil Law of Rome, had been established, as we have seen, in France, Spain, and Italy, by the Teutonic conquerors of the Roman Empire as a means for preserving their conquests; and it gained even a greater foothold afterwards in Germany itself by a species of reaction. At first sight it might be supposed that the Anglo-Saxons would have established the same institution in Britain. But there was no Feudalism in the Anglo-Saxon times in England. There was no conquered people there as on the Continent of Europe to be overawed and kept in subjection. By a course of procedure not entirely unknown

to their more civilized descendants in dealing with alien races, the Anglo-Saxons had either exterminated the Britons, or had driven them into the mountain fastnesses of Wales, Cornwall and Cumberland. If any of the Britons remained under the dominion of their conquerors—and there undoubtedly was some remnant left—they were too weak or too dispirited to give any concern to their conquerors. The Anglo-Saxons had simplified the problem which had confronted the Teutonic barbarians elsewhere. There was no conquered people to be kept in subjection, and there was therefore no occasion for the Feudal System.

But when in A. D. 1066, the Anglo-Saxons in their turn were treated to a taste of the cup of bitterness which they themselves had proffered to the Britons six hundred years before, and William of Normandy, with his hungry horde of buccaneers, descended in large part from the old Scandinavian pirates and freebooters of the North Seas, invaded and subjugated England, the Conqueror found the Feudal System, then at its zenith on the Continent of Europe, a ready instrument for the consolidation of his conquest; and he established a military despotism, which for a time was the most oppressive and the most tyrannical in Europe. He confiscated nearly all the land, despoiled and impoverished the previous Anglo-Saxon proprietors, and parcelled out their holdings among his own followers upon a purely military tenure for services rendered and thereafter to be ren-

dered. The principal beneficiaries of the spoil subdivided the land among their own retainers upon a similar military tenure. The Anglo-Saxons, like the Helots of Lacedæmon, were reduced to a state of serfdom or *villeinage,* as it was called, between which and abject slavery there was but little practical difference. They were fixed to the soil, and could not leave it without the permission of their feudal masters, for whom they were required to toil and till the land. The Feudal System in its most aggravated form was firmly fixed upon England. It was the beginning of an entirely new social system, and necessarily therefore of a new jurisprudence; and from this time, is to be dated the beginning of the Common Law of England.

It may well be assumed that William of Normandy did not greatly concern himself with matters of jurisprudence further than as it was necessary to consolidate his conquest. Nor did his immediate successors, William Rufus, Henry I, Stephen of Blois, and the Empress Queen Matilda, expend any effort on the improvement of English Law. The Anglo-Saxons had a system of county courts which seem to have fairly well served the purpose of the administration of justice. William established an *aula regia,* or royal court, with a chief justiciary, as he was called, to represent the king; and out of this *aula regia,* in course of time, grew the Courts of King's Bench, Common Pleas, and Exchequer, well known to the later history of English Law. But the system of

law administered by the *aula regia* and the chief justiciary was crude and uncertain. In fact, there was little worthy of the name of a legal system. The rude usages of Feudalism constituted nearly all the law that there was. The only law which the Norman barons knew, or for which they cared, was the law of war and the transfer of real estate under the Feudal System. The language of the courts was, and thereafter for several centuries remained the Norman French, a fact which of itself shows how little the Anglo-Saxon population was regarded in the matter of the administration of justice. This population was generally relegated to the county courts. So far as there was commerce in London and a few other cities, it was left to regulate itself as best it could by the usages and customs of those cities, and by petty tribunals of their own established therein, some of which survived even to quite a recent day.

By reason probably of the very oppressiveness of the Feudal System in England, and in consequence of the violence and brutality of most of the monarchs of the Norman and Plantagenet lines, the severity of the system was more speedily mitigated in England than on the continent of Europe. Though some of them were men of ability, there can nowhere else be found a series of rulers so utterly unprincipled and dishonest than the monarchs of England, with only three or four exceptions, from William the Conqueror to William IV, the immediate predecessor of Victoria. The result of their vio-

lence and of their shameless disregard of the decencies of life was the frequent combination against them in the days of the Plantagenets of the barons and the clergy and the people, upon all of whom they depredated alike. The people, it is true, who were mainly the Anglo-Saxons, figured but little in the transactions of those days, except in so far as their rights were championed by the Church, and sporadically also by the city of London. The first champion of popular right in England was the sainted Thomas a Becket, Archbishop of Canterbury, himself, however, of Norman lineage, who led the first combination against the Plantagenet tyranny, and who in consequence was basely assassinated by the contrivance of the monarch, Henry II (A. D. 1170). He has been characterized as an ambitious churchman, solicitous only to advance his own personal interest and the interest of the Church, by ignorant men who had only a superficial knowledge of the history of the time. Those who really know the history of England of that day know only too well that Thomas a Becket was an honest, upright, heroic champion of Anglo-Saxon right and the sacred cause of humanity against the ablest and probably the most unscrupulous monarch of the Angevin or Plantagenet race. He was not more a martyr of religion than he was of freedom and justice.

Thomas a Becket found a worthy successor in Stephen Langton, also Archbishop of Canterbury, Primate of England, and Cardinal of the Roman Church. In his

time, in the reign of King John, who has usually been designated as the weakest and the worst of the Plantagenet race—although it is not very apparent that, though he may have been weaker, he was any worse than his unprincipled father Henry II, or his equally unprincipled brother Richard Coeur de Lion—the aggressions of the monarch became intolerable, and the barons and the clergy and the forces of the city of London combined to resist them. The combination culminated on that famous day at Runnymede (A. D. 1215), when Langton, ably assisted by Pandolfo, the Papal Legate in England, and by all the archbishops and bishops of England, and by a large body of the barons, constrained King John to sign the Magna Charta, or Great Charter, ordinarily and perhaps not without justice assumed to be the foundation of English freedom. Stephen Langton, who was undoubtedly the author of the document, had the degree of Doctor of Laws from the University of Bologna, and was therefore a doctor of the Roman Civil Law. From this source, and not from English Feudalism, he derived his inspiration.

The Magna Charta may be said to stand in the same relation to English Law and English institutions as does our Federal Constitution to the jurisprudence and the institutions of the United States. It is understood that it did not receive the name of the Great Charter which it bears on account of any supposed intrinsic merit, but that it was so called to distinguish it from another char-

ter granted at or about the same time, and sometimes printed and included in it as part of it, which is designated as the Charter of the Forests.

The Magna Charta, as usually given, contains 38 articles—with the Charter of the Forests included, 63 articles. Of these many have become obsolete, having passed away with the Feudal System, the abuses of which they were intended to remedy. Only three can be regarded as of paramount and permanent importance. These were: 1. That the Church should be free; 2. That the city of London and all the other cities and boroughs of the kingdom should enjoy their ancient rights and privileges unimpaired; 3. That no freeman should be deprived of life, liberty or property, except by the legal judgment of his peers or by the law of the land. There was nothing in either of these three provisions of the charter, or indeed in any other provision of it, which was not already established law everywhere else in Europe. And so, although England is justly proud of its Magna Charta, its pride should be tempered by the consideration that at that time England was far behind all the remainder of Europe in the amount of liberty which it enjoyed.

The provision for the freedom of the Church appears in the very first Article, and is again reiterated in the last Article of the charter. It means greatly more than it appears on its face to mean, while it shows that the charter was the work of Stephen Langton and the bishops to a

far greater extent than it was that of the barons. In England, as everywhere else in Europe during the days of Feudalism and Feudal tyranny, the Church was always the champion of the people and of popular right against the feudal barons and the kings and emperors of the time. Only gross ignorance or blind bigotry can deny this fact. The freedom of the Church therefore also meant the freedom of the people; and this in England meant mainly the freedom of the Anglo-Saxon people as distinguished from the Norman barons and their retainers. In fact, it is not at all certain that the majority of the Norman barons of England were opposed to King John at Runneymede. It is evident from Magna Charta itself that it was Langton and the bishops, and the representatives of the city of London, aided by the Papal Legate Pandolfo, and not the Norman barons, who wrung the Great Charter of English freedom from a reluctant monarch. The Norman barons deserve very little credit for it.

There was a significance also in the confirmation of the ancient rights and privileges of the city of London. It is unnecessary to go beyond the work of Blackstone to ascertain that the city of London was not governed by the law of Feudalism, or by the Common Law of England, but was a law unto itself, with its own usages and customs, and its own special courts to enforce them. It is necessary, however, to go a little beyond the work of that able, but not wholly honest commentator, to learn

the fact that the usages and customs of London were traceable to a Roman source and to the Roman Civil Law. The city of London was a body corporate, like all the other great municipalities founded by the Romans; and the Feudal Law was incapable of comprehending corporations, either public or private. Municipal corporations in fact were an abomination to Feudalism. The confirmation of the privileges of the city of London, therefore, meant not merely a check to monarchical tyranny, but even more a check to Feudalism and to the law evolved from Feudalism. It is curious to note that, although the reasons for the perpetuation of the special privileges of the city of London have long since ceased in consequence of the general adoption of the principles of civil liberty throughout the country, there are remnants of those special privileges yet in existence.

But by far the most important provision of Magna Charta, not perhaps in the day of its promulgation, nor for many ages afterwards, but in consequence of its remarkable development in comparatively recent times, was the article which provided that no freeman should be deprived of life, liberty or property, except by the law of the land or by the judgment of his peers. From the standpoint of the time the provision was no doubt all that could be devised at that day; but from our standpoint it is grossly deficient in the feature that it allows that life, liberty and property might be taken without due process of law, or any process whatever of law, mere-

ly by the judgment of one's peers. And life, liberty and property were only too frequently taken in England in the time of the Plantagenets, Tudors and Stuarts, down even to the end of the Eighteenth Century, in pursuance of bills of attainder enacted by packed and subservient parliaments at the instance of arbitrary monarchs. Theoretically the same thing might be done to-day; but the moral sense of the community would, of course, revolt against it. By the provisions of our Federal Constitution and the several State constitutions we have cured as far as possible that fatal defect of Magna Charta.

It will also be noticed that the protection against unlawful governmental action provided by the article in question is limited to *freemen;* and we know that by the word *freemen* in that day only the Norman landholders were meant, and not the great mass of the Anglo-Saxon people who were then, and for a long time afterwards remained in a state of *villeinage* or slavery, with extremely restricted civil rights, dependent indeed in great measure, as we have already indicated, upon such security as the church could afford them. But according as this state of *villeinage* was relaxed and finally became obsolete in the course of the Wars of the Roses, the Anglo-Saxon population also became entitled to this immunity provided by Magna Charta.

The article in question, however, had great possibilities; but they were only made fully apparent in much later times. They were invoked in the contest between

Charles I and the Parliament; but it was reserved for that eminent civilian William Murray, Lord Mansfield, who became Chief Justice of the Court of King's Bench in A. D. 1756, and who may be said to have almost revolutionized the English Common Law, and for our own America, to manifest the full significance of this provision of Magna Charta. In our Federal Constitution the words of Magna Charta, divested of the alternative which we have had occasion to criticise, have been transcribed, to the effect that no man "shall be deprived of life, liberty, or property without due process of law" (Fifth Amendment); and they have been copied into all the constitutions of all the States of the Federal Union.

Magna Charta remained the supreme law of England as long as Stephen Langton lived; but the great archbishop did not long survive its promulgation. King John repudiated it as soon as he felt free to do so; and the outraged bishops and barons pronounced sentence of deposition upon their king, and called in Louis of France to take the crown. John died during the contest. His son, Henry III, a child at the time, was proclaimed in his place, and the French prince withdrew. Henry III, as soon as he was able to do so with apparent impunity, frequently violated the provisions of the charter, and was compelled by the bishops and barons to promulgate it anew, and to swear to its observance. He was as weak, and almost as wicked as his father; and his repeated perfidies gave occasion for a movement of the bishops and

several of the barons against him, under the leadership of Simon de Montfort, Earl of Leicester, one of the greatest Englishmen of his age or of any age, although he was not in fact an Englishman by birth, but a Frenchman. To Simon de Montfort belongs the credit of bringing the unprincipled monarch to terms, and of calling a parliament, which was the first and the last genuine parliament of England worthy of the name before the enactment of the Reform Bill of 1832, which really gave England its present constitution.

Plantagenet, Tudor and Stuart, kings, each and all of them, swore at their coronation to observe the Great Charter. Some of them swore several times to do so. Each and all of them, excepting three, deliberately and wilfully perjured themselves, and violated its provisions whenever it suited their convenience so to do. For a time, indeed, it would seem as if Magna Charta tended rather to sustain the institution of Feudalism than to extend the principle of civil liberty, since it secured to the barons the exercise of their feudal privileges without interference from the sovereign. But one hundred and fifty-two years after its first promulgation the contest arose which shook the institution of Feudalism in England to its very foundation, and opened the way for its final overthrow in that country. In A. D. 1377 commenced the struggle of upwards of a hundred years between the rival houses of York and Lancaster, both of them branches of the line of Plantagenet, for the posses-

sion of the throne of England, which, after numerous vicissitudes, some intermissions, and many alternations of victory and defeat for both parties, was finally terminated in A. D. 1485, by the practical destruction of both and the accession of a new dynasty of more than questionable legitimacy, that of the House of Tudor, in the person of Henry VII, who claimed, however, to have inherited the claim of the House of Lancaster, but who found it expedient to obviate all further dissension by effecting a matrimonial alliance with the heiress of the House of York. During the struggle all the great Norman barons perished; and Feudalism may be said to have perished with them, when one who is entitled to be called the last and greatest of his race, Guy of Warwick, the King-Maker, so called because he had made and unmade kings of both families, with his brother, the Earl of Montagu, fell in the bloody battle of Barnet, in A. D. 1471—14 years before the termination of the conflict. But the forms of Feudalism survived for many years after the Battle of Barnet and the death of the great earl; and they are even yet potent in England. New men were raised to the rank and titles which the Norman barons had borne; but they were men of the people, in the sense that they had no ancestry of which to boast; and the places of the Norman barons were never again filled.

The position of the Tudor line in English history, and in the development of English law, is peculiar. Its

founder, Henry VII, was a miser, with low instincts and plebeian habits; and his legitimacy, as we have stated, was exceedingly doubtful. His son and successor, Henry VIII, was easily the worst of all the ruffians that ever wore a crown. Neither of them desired to restore the institution of Feudalism; and both sought to depress the aristocracy with the view of aggrandizing the power of the crown. The Tudor monarchy was an absolute and irresponsible despotism, the most absolute and irresponsible that England had known since the death of William Rufus. Feudalism died in its atmosphere, and popular liberty was not yet born in England. In the great War of the Roses, Magna Charta had been consigned to the lumber room of forgotten parchments. Henry VII and Henry VIII and Elizabeth had but little use for "the law of the land." Their will was law. In England, as in France, the Feudal oligarchy had given way to the absolute Feudal monarch. But absolutism was sooner to receive a check in England than in France. This came about mainly through the accident of the failure of the line of Tudor and the succession of an alien family, the Scottish House of Stuart, to the throne of England.

In temperament and tendency the Stuarts were as absolute as the Tudors; and they boldly preached the divine right, as they called it, of kings to rule independently of their people, which the Tudors had been content to practice without making noisy proclamation of it. But absolutism received a terrible shock in the rebellion of

the parliament against Charles I, the defeat and execution of that unfortunate monarch, and the temporary triumph of Oliver Cromwell and his fanatical Covenanters. And again a severer blow, its death-blow in fact, it received when, by the Revolution of 1688, the Stuarts were replaced by William of Orange, from Holland, and then by the stupid and beastly line of Dutchmen from Hanover, known as the House of Brunswick, which for a time turned over the government of England to an aristocratic cabal. But this aristocratic cabal was not a revival of Feudalism. Feudalism was dead. Oliver Cromwell had effectively destroyed it. It could never again be restored. It had left its almost indelible impress upon the jurisprudence of the country, and especially upon its land-tenure; but as a political and judicial system it was dead.

There was not much law in England in the time of William the Conqueror and his immediate successors. Might made right in those days; and lawless monarchs and lawless barons had but little regard for the principles or the practice of jurisprudence. It is true, however, as already stated, that William established a court, the *aula regia,* or royal court, with a Norman bishop as its head called the Chief Justiciary, for the general administration of justice. But there was no certain or fixed system of law, much less any code of law. There was something like a legal system in Normandy, under the influence of the Roman and Carlovingian civilization in

France which had succeeded in humanizing even the rude descendants of the Northmen who had wrested the province from France; but it was mainly the criminal classes of Normandy, and adventurers in search of spoil, who accompanied and followed William to England; and these had no great use for law. Consequently the *aula regia* had only the rudest usages of Feudalism to administer as law. In the total absence of legal system, its administration of justice was almost of necessity arbitrary, vacillating, and uncertain. It was this condition of things that so frequently induced the popular demand, to which reference has already been made, for a restoration of the laws of Edward the Confessor, the wisdom of which even the Norman barons appreciated.

Outside of these spasmodic and ineffectual efforts for the restoration of the laws of the sainted Edward, the first substantial attempt from within to reduce order out of the chaos was by one Ranulph de Glanville, a Norman English Bishop, who was Chief Justiciary for King Henry II, the founder of the House of Plantagenet, for ten years (A. D. 1180-1190). He was appointed to his high office ten years after the murder of Thomas a Becket, who had been prominent in his efforts for an amelioration of the law; and how far his assassination may have influenced Glanville in his work, it is perhaps impossible now to ascertain. Glanville wrote in the then prevalent Norman French the first known work on English Law which we now possess; and he styled it—"*Tractatus de Legibus*

et Consuetudinibus Regni Angliae"—or "A Treatise on the Laws and Usages of the Kingdom of England"—which comprises fourteen books. It is not, however, as its name would seem to imply, a treatise on law, but rather a manual of the procedure and practice in the *curia regia,* or royal court, in which the principles of law are only incidentally mentioned. The purpose of Glanville evidently was not to expound the law or write a commentary upon it, but only to aid the administrators of the law in the conduct of their office.

About a quarter of a century after Glanville, the Magna Charta was promulgated (A. D. 1215). It was intended to make, and undoubtedly in course of time it did make, a vast improvement in the English Law. Besides the great principles of civil liberty which it sought to enforce, it contained some practical provisions for the improvement of the administration of justice. It would seem that the *aula regia* or *curia regia* had already been divided into the Court of King's Bench for the trial of criminal cases, and into that of Common Pleas for the adjudication of civil causes. Both had been ambulatory with the king; and the kings in those days had no permanent seat of government. For the trial of civil causes especially this was felt to be a hardship; and there was a provision inserted in Magna Charta that the Court of Common Pleas should be established at a certain fixed place. In the subsequent reign it was permanently fixed at Westminster. It was not for some time that the Court

of King's Bench also was definitely established at the same place.

For two years, A. D. 1265-1267, Henry de Bracton, also an ecclesiastic like Glanville, was Chief Justiciary of England, during the reign of Henry III. He may have occupied the position for a longer time; for very little is now known concerning him. About A. D. 1267, he wrote a work entitled "*De Legibus et Consuetudinibus Angliae,*" almost the same title that is borne by Glanville's work. But Bracton's book is not a mere treatise on practice, but a true and valuable exposition of the principles of the law, the first of its kind in England. It was confessedly based on the Institutes of Justinian, which it followed as a model, and from which it extracted almost bodily all its law of personal property. Feudalism, as we have seen, had no law of personal property. It scarcely dealt with that subject at all. It was concerned only with real estate and feudal tenures. Of the law of contracts, the law of bailments, the mercantile law, the maritime law, it knew absolutely nothing. They were all wholly foreign, and antagonistic to it. Bracton sought in some measure to supply the defect; and his treatise was for many ages accepted as the standard text book of the law.

King Edward I, son and immediate successor of Henry III, whose reign extended over the comparatively long period of thirty-five years (A. D. 1272-1307), has been frequently styled the English Justinian for the great im-

provements which he is assumed to have made in English Law. The title has very little foundation of fact on which to rest. He deserves better the title of murderer of countless thousands of Scotch and Welsh patriots whom he ruthlessly sacrificed to gratify the unhallowed ambition which he entertained to unite the whole of Great Britain under his own sceptre. It is true that there were several legal enactments passed in his reign, as many as twenty in all, which have survived to our own time, and actually enter into our legislation of to-day, and which therefore have been confirmed by the verdict of long experience. But it is very safe to assume from what we otherwise know of Edward, that he had himself no part in drafting these enactments, which were probably the work of his Chief Justiciaries. Edward himself does not appear to have had any knowledge of law, or any concern for its improvement. But in his reign there were written two important treatises on English Law, which have come down to us. Both were written in Norman French. One was entitled "*Summa de Legibus Angliae*"—or "Compendium of the Laws of England"—which was written about the years, 1270-1275, and is attributed to one Britton or Breton, of whom nothing else is known than that he was the author of this work. It was an abbreviation of Bracton's work; and, in fact, there is some reason to suppose that Britton and Bracton are different names of the same person. The other of the two treatises to which we have referred was published under the title of "Com-

mentary on English Law," and was the production of one Fleta, the assumed name of some otherwise unknown person who wrote the book while he was confined for some reason in the Fleet Prison, whence was derived the appellation of the author. It was written about the year 1287. Both Britton and Fleta drew largely upon the Roman Law; it was the only source from which the law of England could be improved; and both works indicate a marked advance in the development of the English Law.

But the first true commentator on the Common Law of England was Thomas de Littleton, who, unlike his predecessors, was not an ecclesiastic, but a lawyer by profession and a judge of the Court of Common Pleas for fifteen years (A. D. 1466-1481) in the reign of Edward IV. He died in office in the year 1481. His work was on the Law of Tenures, and dealt mainly with the tenure of real estate under the Feudal Law, as established by the decisions of the courts down to his time. Like the works of his predecessors who have been mentioned, his treatise was written in Norman French, which yet remained the language of the courts of law, although it had been abandoned by the kings, and by the aristocracy and people of England. Unlike his predecessors, however, he borrowed nothing from the Roman Law; nor is it apparent how he could have borrowed anything from the Roman Law for a system so radically antagonistic to that Law as was the system of Feudalism, to which he

confined himself. His treatment of his subject was distinctly and exclusively English; and it is quite exhaustive. No special examination of it is needed, for the reason that, as is well known, his treatise is the basis of the Commentaries of Sir Edward Coke, and of the Commentaries of Sir William Blackstone, to which we will have occasion to refer more at length; and these have now wholly superseded the work of Littleton as an exposition of the English Law. Littleton, it may be remarked, was an adherent of the House of York as against the House of Lancaster; and his political affiliations may have to some extent colored his view of the law, as undoubtedly the views of Coke and Blackstone in later times were colored for similar reasons. It is a peculiar fact, which may also be noted here, that, notwithstanding the exhaustive character of his work, Littleton makes no mention of equitable estates, although they then existed; and yet his will, which is still extant, expressly created an equitable estate in his own property. Equitable estates were derived from the Roman Law; and Littleton was willing, when he died, to take advantage of that law; but he seems to have been too intolerant a feudalist to admit its superiority in his work.

For about a century and a quarter—that is, from about A. D. 1470, when Littleton wrote, to about A. D. 1628—Littleton's work remained an authoritative exposition of the English Common Law. It comprised the period of the Tudor sovereigns during which religious rancor

and religious strife occupied the attention of England more than did the law. It was the time of England's most absolute monarchy since William the Conqueror; and consequently it was no time for lawyers, or for the development of the law— although one of the greatest and wisest of English lawyers, the illustrious Chancellor Sir Thomas More, flourished during the period. And yet there were numerous legal enactments passed during the Tudor Period for the betterment of the law; and some of these have been perpetuated to the present day. One of them was the Statute of Wills enacted in the 32d year of Henry VIII, A. D. 1540, by which real estate, wills of which had been unknown since the time of William the Conqueror, was made freely devisable by will. This was the introduction into the Common Law of England of a distinctive principle of the Roman Civil Law. This, with what is called the Statute of Uses, enacted five years before, which converted equitable estates into legal holdings, commended itself to the unprincipled monarch, not because it was a step towards civilization, but because by means of it he was enabled to possess himself of many estates which it was otherwise difficult to reach. He deserves no credit for contributing to the removal of the fetters from real estate.

Elizabeth's reign also was marked by legislation that has had a permanent vitality. Chief among the enactments of her time was what is called the Statute of Frauds, which required most contracts to be put in writ-

ing in order to receive enforcement from the courts. It was, of course, the work of the courts and of the lawyers, and not of the sovereign, who knew nothing of law, and cared less for it. It is to be noted, however, that, while there were parliaments of England at this time and had been long before, no parliament ever *legislated* before the period of the Stuarts. They were called solely and exclusively to vote the money which the sovereign needed, and to devise the means by which it should be raised; but they never legislated. They prayed for a redress of grievances; and the sovereign, often as the condition for procuring the money which he wanted, granted the redress. He, and he alone, thereupon enacted the statute which expressed the grievance and provided the remedy for it. The statute was his act, and not the act of any parliament. The very wording of all these statutes is proof enough of these facts, even if we did not know them otherwise from history.

Sir Edward Coke (A. D. 1552-1633) flourished in the reigns of Elizabeth, James I, and Charles I. He was Chief Justice of the Court of Common Pleas during the reign of James from A. D. 1606 to A. D. 1613, and Chief Justice of the Court of King's Bench during the same reign from A. D. 1613 to A. D. 1616, when he was driven from office. Previously he had served as Attorney General; and subsequently for several years (A. D. 1620-1627) he figured in Parliament. In A. D. 1628 appeared his great work, Coke's Commentaries upon Littleton, as

he called it himself, or Coke's Institutes, as it is sometimes called, a monumental work, which taking the treatise of Littleton as its basis, has built upon it a superstructure that remained for over two hundred years the greatest exposition of England's Common Law. Although now antiquated and almost entirely superseded by Blackstone's later and more polished work, it is yet held in the highest esteem by those who are not deterred from reading it by its uncouth and rugged style. Sir Edward Coke was undoubtedly a man of great ability, profoundly versed in the Common Law; and he is justly regarded as the greatest authority that ever existed in that Law. His statements of the law have been always accepted as equivalent to the decisions of courts. But unfortunately when this much has been said of him, all the good that it is possible in truth to say of him has been exhausted. He was a ruffian and a bigot. A coarser or more brutal character never disgraced English history. If there was nothing else against him, his treatment of Sir Walter Raleigh, when that polished adventurer was arraigned for treason, would be enough to condemn him to everlasting infamy. Moreover, as we will see from an episode to which we will have occasion to refer later, while he was the great exponent of the Common Law, he would have arrested the development of that law and of all law indefinitely, if he could have had his way.

A little more than a century and a quarter after the

publication of Coke's Institutes, in A. D. 1765, appeared the great work of Sir William Blackstone, his "Commentaries on the Laws of England," the work so well known to all of us as our present fundamental text book of the Common Law, the most polished and the most attractive treatise on the subject that has ever been written. It was the result of a course of lectures first delivered at the University of Oxford in the year 1753; and this course itself was practically the first effort to teach the Common Law in schools and universities, in the place of the practical education which had been previously furnished alone in the offices of the practitioners of law, and in the institutions known as the Inns of Court. Blackstone's work is the primary text book of the Common Law in the schools, as well as among the members of the bar, although it has never attained the authoritative position held for nearly three centuries by the Commentaries of Sir Edward Coke. For reasons which will hereafter be apparent, both are now in course of being superseded by other expositions of the law; but it is because the law itself has been changed, indeed practically revolutionized, by the rapidly advancing civilization of the Nineteenth Century, for which the old Common Law has been found to be wholly inadequate.

In the works of Glanville, Bracton, Britton, Fleta, Littleton, Coke and Blackstone we find the exposition and the development of the Common Law of England from the time of the Norman Conqueror and the early Planta-

genets down to the latter part of the Eighteenth Century. Two events then occurred, which, according as we look at the matter from different points of view, tended either remarkably to accelerate that development, or else to subvert the whole foundation on which it was based, and to substitute therefor a radically new system of jurisprudence. One of these was the appointment of William Murray, Lord Mansfield, a Scottish jurist and a Doctor of the Roman Civil Law, to the position of Chief Justice of the King's Bench in A. D. 1756, a position which he held and filled admirably for thirty-two years, when he voluntarily relinquished it in the same year (A. D. 1788) in which our Federal Constitution was adopted, and during his incumbency of which he, quietly and yet substantially, effected by his rulings in court an almost entire revolution in the Common Law, more in accordance with the requirements of our advancing civilization than were the tenets of Coke and Blackstone. He was the contemporary of the latter, who was his colleague on the bench; but he was a far abler and more accomplished man than Sir William Blackstone. He was one of the few really great judges of England. There were only three in all. Sir Thomas More and Sir Matthew Hale were the other two. All three were model judges—men, who, not only by their great ability, their learning and their accomplishments, but even more by their personal dignity, their suavity, their unvarying courtesy, and their high moral character, commended themselves alike to the love

of their contemporaries and to the respect and esteem of all subsequent generations. From the Roman Civil Law Lord Mansfield introduced into the Common Law the Law Merchant or Mercantile Law, and laid the foundation for the introduction of the Law of Bailments, to both of which the Common Law had previously been a stranger. And he paved the way for the great improvements of the Nineteenth Century. No other Englishman, except perhaps Lord Bacon, has done more for civilization than the Earl of Mansfield.

The other occurrence to which reference has been made, but which however demands separate treatment by us and a chapter to itself, was that of our American Revolution, which did more to shatter the fetters of Feudalism and to break down all the systems of law born of Feudalism than perhaps any other one event in history.

But there is another side to the Jurisprudence of England which demands, and should here receive, some notice by us. And it requires that our retrospection should go back briefly to the time of the origin of the English Common Law. Strangely enough, while the Common Law of England must be dated from the time of the introduction of Feudalism into the country by William the Conqueror, the germs of the Roman Jurisprudence and of the Roman Civil Law were introduced at the same time, or very soon afterwards. The Roman Jurisprudence, as we have seen elsewhere, under the influence of the

ecclesiastical authorities and of the legislation of Charlemagne, was then making great progress in France. It had never wholly perished from that country. It had received a serious check in Normandy when the Northmen wrested that rich province from the later Carlovingian monarchs; but it survived that disaster, and resumed its encroachments upon the Common Law of Feudalism, according as the Northmen yielded more and more to the Roman-Frankish civilization.

Many of the Norman prelates, versed both in the Common Law and in the Civil Law of Rome, went over to England with William the Conqueror, and became prominent in his councils and in those of his successors. In fact, the Norman kings of England not only confiscated all the lands of that country for the benefit of their own military retainers, but likewise caused all the bishopries of the kingdom to be filled by ecclesiastics from Normandy. The Norman barons, like the barons everywhere else, were rude, ignorant, and illiterate, unable either to read or write. The kings were usually no better. Henry I of England, the younger son of the Conqueror and second in succession to him, acquired the title of *Beauclerc,* or good cleric, meaning good writer, because he was an exception among the monarchs of the time, and actually could write his own name, which most others of his class never learned to do. Consequently in matters requiring intelligence and education, as well as also for religious reasons, the kings

naturally, and almost of necessity, turned to the bishops for advice and counsel. Hence these latter acquired great influence in the State; and they were always called in with the barons to deliberate on the affairs of the realm. To this day, notwithstanding that the circumstances which justified the arrangement, have long since ceased to exist, the English bishops, that is, the bishops of the Established Church in England, constitute an integral portion of the membership of the House of Lords, and are entitled to participate in all the legislation of the country.

A "Keeper of the King's Conscience," as he was called, was appointed from very early times. He was always a bishop. From the time of the Norman Conquest down to the reign of Henry VIII, this official was always a high dignitary of the Church, and ranked next to the king in dignity. The celebrated Cardinal Wolsey was the last of the long line. The "Keeper of the King's Conscience" became virtually what we would now call Prime Minister. Through him the internal affairs of the kingdom were usually administered; and to him was especially committed the matter of the redress of grievances whenever there was complaint of grievances to be redressed. It was his duty also on extraordinary occasions to administer justice in the name of the king. He was not usually the Chief Justiciary of the kingdom, although in the early times the two offices seem to have been sometimes combined in one person. All royal writs

to set the machinery of the courts of justice in motion were issued from his office; and when these courts were unable to administer adequate relief to litigants, as under the limitations of the Feudal Law they frequently were, petition was made to him to devise some relief for the situation. Thus his office, originally administrative only, became also judicial. The court, which thereby grew up, became known as the Court of Chancery, from the railings (in Latin *cancellarii*), by which it was surrounded. The branch of law which it administered became known as *Equity,* to distinguish it from the strict and rigid *justice* administered by the Courts of the Common Law. And from this source is derived our modern American and English Chancery or Equity Jurisprudence. The terms mean the same—one being derived from the original local surroundings of the Court, and the other from the character of the jurisprudence which it administered.

As we have already stated, the Anglo-Saxons had a system of county courts, which William the Conqueror permitted to continue in existence; but he established a general court for the whole realm, which was called the *aula regia,* or *curia regia* (royal court), and which gradually drew to itself the jurisdiction of the county courts, which, for this reason, soon became obsolete or were suppressed. From the *curia regia* sprang in succession the Court of King's Bench, intended primarily for the trial of causes in which the state was concerned, which were mainly criminal cases; the Court of Common Pleas, in

which only private controversies or suits between individuals were cognizable; and the Court of Exchequer, which took jurisdiction of all causes affecting the royal revenue. How the Courts of King's Bench and Exchequer drew to themselves concurrent jurisdiction with the Court of Common Pleas in many cases need not here be stated. It will be found at large in the text-books. These three courts became vested with all the legal jurisdiction in England.

The methods and processes of these courts seem to have been fairly sufficient for the times of the Norman and Plantagenet kings, and down even into the Tudor times. They built up an elaborate, and to a great extent exceedingly artificial system of pleading and practice. In many instances, as in the matter of common fines and recoveries (see Blackstone, B. II, Ch. 21), their procedure was puerile and almost ludicrous, although for the time they served a useful purpose; and very often the processes of the courts tended to encourage chicanery rather than to further the ends of justice. But there were many cases where they wholly failed to meet the requirements of justice; and as commerce and civilization advanced, these cases were greatly multiplied, and the deficiencies of the Common Law became more apparent. Appeals to the Keeper of the King's Conscience became more numerous; and the Chancellor, as he then commenced to be called, was more frequently entreated to find a remedy. He never failed to find it in the ready

store-house of the Roman Civil Law, with which as an ecclesiastic he was always well acquainted, and he administered the remedy under the name of Equity—which we can now see to be only a synonym for justice as distinguished from the rigidity of the law. Equity, therefore, is no more than the combination of those parts of the Roman Civil Law which the Chancellor of England was called upon from time to time to introduce. It is not, strictly speaking, a system, for it has no coherence in itself. It is composed of fragmentary portions of the Roman Law without connection with each other. For it is to be remembered that the rule was early laid down which yet prevails, that we are not to have recourse to the Chancery Court, unless there is no remedy, or only an inadequate remedy, at Common Law. Hence arises the difficulty which has always existed of defining the meaning of Equity Jurisprudence and the scope and extent of the jurisdiction of the Court of Chancery. The difficulty is the necessary result of the circumstances under which the jurisdiction was introduced.

The growth of this jurisdiction was not unopposed in England. In fact, there was bitter antagonism to it manifested both by the Courts of the Common Law and by the parliaments of England—indeed, by almost every parliament without exception down to the beginning of the Eighteenth Century. And the reason is evident. With the exception of the famous parliament called by Simon de Montfort in A. D. 1265, there never was a

parliament of England that represented the people of England from the days of the Conquest to the time of the Tudors. There were many parliaments; but they were only collections of the feudal classes and their representatives. They were Norman parliaments, as the courts of law were Norman courts; and both parliaments and courts of law contended strenuously on all occasions for the retention of the principles of Feudalism. It was natural, therefore, that they should have opposed the Roman Jurisprudence, even when disguised under the name of Equity. It was very natural, also, that in those days the courts of the Common Law should have looked with disfavor on a tribunal, the very existence of which was based on the theory of their own inadequacy to meet the ends of justice.

The student of English history will readily recognize why it was that the contest slumbered, and did not become acute until the accession of the Stuart Dynasty to the throne of England in A. D. 1603. It then culminated in a sharp and decisive issue between the Court of King's Bench, presided over at the time by Sir Edward Coke, and the Court of Chancery, then held by Lord Ellesmere. Personal enmity between these two men aggravated the issue. The occasion was a comparatively unimportant case, and an occurrence not at all unusual at the present day.

A judgment had been rendered by the Court of King's Bench for a sum of money claimed to have been due. As

was subsequently most satisfactorily shown, the money had in fact been paid by the defendant before the institution of the suit, and he had received a receipt for the payment. This receipt he had lost or mislaid, and he was unable to produce it at the trial. Upon such testimony as was adduced, whatever it was, judgment was rendered for the plaintiff in the suit. The defendant subsequently discovered the receipt, but too late to make it available in the suit at common law. The term of court was past at which the judgment had been rendered, and the judgment had become a finality. The defendant thereupon instituted suit in the Court of Chancery to enjoin the plaintiff from enforcing his judgment by execution. The Chancellor was entirely satisfied with the showing made to him, and issued the injunction, and restrained the holder of the judgment from further proceedings at common law.

The proceeding is so common now that no one would dream for a moment of objecting to it; but in that day the jurisdiction of Equity to grant the desired relief was not so definitely established as it is now.

Sir Edward Coke became furious at what he regarded as an unwarrantable interference by the Court of Chancery with the processes of his own Court of King's Bench. In vain did Ellesmere seek to explain that the injunction of the Court of Chancery was upon the person of the litigant, and not upon the court in which he had sued. Coke could recognize no such distinction.

The dispute between them became so warm that appeal was had to the king in person to settle the unseemly contest. It was the last time that a monarch of England was called upon to exercise his royal prerogative of intervening personally in the administration of justice.

At this juncture a greater man than Ellesmere entered the lists on behalf of the jurisdiction of the Court of Chancery—the man who bears probably the greatest name in English history—a man great as a philosopher, great as a writer, great as a lawyer, great as a statesman—a man profoundly versed in all the learning of the time—a thorough student of the Roman Civil Law—a man who, if some writers of the present day are to be believed who attribute to him the authorship of the wonderful dramas that have gone for several centuries under the name of William Shakespeare, would have to be regarded as the greatest genius that has ever arisen among the sons of men—and yet a man with such shortcomings as induced the poet Pope to characterize him as "the greatest, wisest, meanest of mankind"—Francis Bacon, commonly known as Lord Bacon, and as Baron of Verulam and Viscount of Saint Albans. He was then Attorney General, and was himself destined soon afterwards to wear the ermine of the Chancellor. To him in no small degree is due the result of the contest.

It was fortunate for the cause of jurisprudence and of civilization that it was a Stuart, and not a Tudor or a Hanoverian—a Scotchman with some education and some

little training in the principles of the Roman Civil Law, and not an Englishman acquainted only with the Common Law, or a Guelph profoundly ignorant of all law, that then sat upon the throne of England. The Stuart Kings of England have done but little to justify their existence, although they were no worse than either their predecessors or their successors; and this man James I, who then reigned and who had been called from the throne of Scotland to fill that of England also, was a conceited coxcomb and pedant, who made undue pretensions to knowledge and wisdom, but was justly characterized by one of his contemporaries, the witty Frenchman, the Duke de Sully, Prime Minister of Henry IV, of France, as "the wisest of the fools of Europe." But he was nevertheless a man of some education, with some sense of natural justice; and his training and his predilections induced him to side with Bacon and Ellesmere, and to uphold the jurisdiction of the Court of Chancery.

Coke withdrew from the contest in disgust; he was soon afterwards relieved of all his offices. Notwithstanding his confessedly great ability and his great and intimate acquaintance with the Common Law, his enforced retirement from the Bench was not a loss to jurisprudence, for he had rather brought disgrace upon it by his brutal coarseness and vulgarity. He was returned to Parliament afterwards, and exerted himself quite vigorously in opposition to the arbitrary measures of King Charles I; but his brutality and his intense bigotry did

more harm than good to the cause of popular liberty. He hated Bacon with all the intensity of his coarse nature. They had been rivals; and they became bitter enemies.

By the decision of James I the jurisdiction of the Court of Chancery to administer the principles of Equity in accordance with the Roman Law was firmly established in England, and was never thereafter seriously questioned, although the antagonism to it did not thereupon cease. Equity became a recognized concurrent branch of English Jurisprudence. It grew side by side with the Common Law. With the continued advance of commerce and civilization and the growing necessity for recurrence to the Roman Law to solve the more complex problems of human transactions for which the Common Law became daily more and more inadequate, it received a development under several successive chancellors of great ability, such as Somers, Hardwicke, Loughborough, Lyndhurst and Brougham, which has enabled it in modern times greatly to overshadow the Common Law branch of the English system. Indeed, were it not for the bold, but salutary innovations of Lord Mansfield, to which reference has already been had, it is questionable whether the Courts of Common Law might not have become obsolete before this, and the vast majority of legal controversies have found their way into the Court of Chancery. This result may be said to have supervened anyhow at a later date; but it came under different circumstances and conditions. Lord Bacon would have had

it come in his day; but England was not then ripe for it.

The triumph of the Court of Chancery through the efforts of Bacon and Ellesmere was distinctly a triumph of the Civil Law of Rome over the Common Law of England. The Roman Law thereby became entrenched in the very citadel of its most persistent enemy; and it grew and flourished, and became enlarged, while its rival, except for the additions to it made by Mansfield, remained practically stationary. The Common Law had no flexibility; the Jurisprudence of Equity readily adapted itself to all the increasing demands and requirements of advancing humanity.

There was another element that intervened in the contest, and ultimately contributed to secure the final triumph of the Roman Law. There have been parliaments in England since the days of the early Plantagenets. With the exception of the Parliament of Simon de Montfort in A. D. 1265, and to some limited extent possibly two or three other Parliaments, these assemblies were not convened to legislate for the country. Legislation in England down to the end of the Tudor period was solely and exclusively in the hands of the sovereign. The Parliaments were called merely for the single purpose of supplying money to the sovereign for carrying on his enterprises. The wasteful, extravagant, and all of them wholly wicked and unjustifiable wars carried on by the English Kings from the time of William the Conqueror to the accession of the Stuarts, required more

revenue than the royal exchequer could derive from the ordinary sources. The barons and the bishops, and later also representatives of the counties and boroughs, were called in parliament to meet the demand, and they were required to supply it under penalty of incurring the royal displeasure. Frequently the assemblage made use of the occasion to petition the king for a redress of grievances of which they complained. Bolder parliaments under weaker kings made their grant of subsidies conditional on such redress. The kings sometimes acceded to the demands, and sometimes they refused them; and sometimes they compromised deceitfully by apparent compliance in the first instance and the revocation of their grants when the pressure upon them was removed. This formulation of grievances by successive parliaments and the grant of relief based thereon by the sovereign, is what is characterized by English historians as parliamentary legislation. How little it deserves that character is quite apparent. But the arrangement ultimately served the purpose of enabling the parliaments of the Stuarts to wage war upon the Stuart Kings, and to pave the way for the establishment of a genuine parliamentary system.

The contest of the parliamentary party against the Stuarts was the effort of a blind Polyphemus in his rage to tear down the existing social edifice with the view of replacing it with something better, of which it had no adequate conception, and which only came at last through

the influence of various extraneous circumstances. The accession of the Hanoverian line marked the debasement of the monarchy and the transfer of power to the aristocracy; and the parliaments of the Hanoverian Period merely registered the will of an aristocratic cabal. It was the fact that this aristocratic cabal was itself divided into factions that finally led to the establishment of a government of the people by parliaments elected by the people. The present British Constitution, for the origin of which it is the custom of various writers, English and American, to seek back into the morning twilight of the ages, can be dated very specifically from the enactment of what is known in English History as the Reform Act of A. D. 1832, in pursuance of which Parliaments of the People of England were finally established.

As soon as the people obtained power, the parliament began truly to legislate; and the records of the Nineteenth Century show the greatest activity, not only in remodeling the political institutions of the country, but likewise in the improvement of its jurisprudence. Into the details of this legislation it is unnecessary here to enter. Suffice it to say that every modification made in the existing Common Law was in the line of the introduction or restoration of some rule or principle of the Roman Civil Law, many of them substantially to the same effect as laid down in the Code Napoleon. Many and radical have been the changes effected. They may be said to have culminated in a series of remarkable enact-

ments passed in the years 1873, 1874 and 1875, commonly known in England as the Supreme Court of Judicature Acts, because their main purpose was a total reorganization of the English judicial system. By these Acts that system was completely remodeled. All the old immemorial courts of Westminster, the King's Bench, the Common Pleas, the Exchequer, and all the rest of them, were abolished; and one Supreme Court of Judicature, as it was called, was established in their place, with the Lord Chancellor at its head, and the Chief Justice of the Court of King's Bench, or the Chief Justice of England, as he is now called, as next in rank to the Chancellor as a member of the Court. This new tribunal was to have general jurisdiction of all causes, both civil and criminal; and it was authorized by the statute to subdivide itself into different branches for the performance of the different classes of business. For these branches the old names of Chancery, King's Bench, Common Pleas, Probate and Admiralty were retained; and a Court of Appeals was provided within the Supreme Court of Judicature, composed of the Chancellor, the Chief Justice, and three Lords of Appeal, as they were called, to sit in review of the decisions of the subordinate branches. It was a radical reorganization based upon a somewhat similar judicial system that had previously existed in our state of New York, and practically the same as the contemporaneous system existing in our District of Columbia, and which likewise had been based

on the New York model. It is curious, however, to note that both in New York and in the District of Columbia the system has been abandoned—in New York, however, with some reservation—while in England it seems thus far to have given satisfaction.

But this reorganization of the English judicial system, radical though it was, might well be regarded as a mere detail, without significance as to the great underlying contest between the Roman Civil Law and the English Common Law, were it not for a single short sentence in one of the enactments most momentous and far-reaching in its scope. It was to the effect that thereafter, whenever the rules of the Common Law and those of Equity were in conflict, the rules of equity should prevail. This was a final statutory acknowledgment of the superiority of the Roman Jurisprudence over the Common Law of England, and a substitution, as far as it was then deemed possible, of the former for the latter. It was the consummation of the victory won by Bacon and Ellesmere over Coke. It was the final triumph of the Roman Civil Law over the tenets of Feudalism in Feudalism's last stronghold. The great contest was practically at an end forever. It is very true that many of the traces of Feudalism yet remain in the jurisprudence, and yet more in the social system of England; and it may be many a day before all these traces are eliminated. The country yet clings to its aristocracy, to its antiquated House of Lords, to the abomination of a State Church, to the doc-

trine of primogeniture, to the exclusion of females by the males in the matter of inheritance, to the laws of entail, although these are now greatly restricted, and to some other features of the ancient feudal tenures. But it is very plain to every student of the history of the times that all these will sooner or later be eradicated; and that it is only a question of time when every trace of Feudalism will disappear from the English Jurisprudence. Certainly England will never again revert to the narrow bigotry of Sir Edward Coke. One great feature, however, supposed to be peculiar to the Common Law and distinctively its boast, yet remains; and that will later merit our consideration.

CHAPTER X

THE DEVELOPMENT OF OUR AMERICAN LAW

But what of ourselves in all this conflict, and contest, and turmoil? What have we to do with Feudalism and its struggle against the Civil Law of Rome? What is all this to us in America? Is it not the story of a far off disturbance, distant in space, distant in time, which has for us only a merely scholastic interest? It would be a most grave mistake to answer this last question in the affirmative. Are not all students of law in their first year of study directed to read the chapters of Blackstone on the Feudal System and feudal tenures as a necessary introduction to the common law of real estate? It used to be the custom also, and possibly it is yet the custom, to recommend in the same connection the perusal of the Introduction to Robertson's History of the Emperor Charles V, of Germany, wherein the subject of the Feudal System has been treated probably more lucidly and more compendiously at the same time than by any other English writer. Now, this is not without significance that the subject is of present practical importance, and that a knowledge of it is necessary to a proper acquaintance with our present law.

Again, let us look at the matter from another standpoint. We have something like fifty legislative bodies engaged annually or biennially in making laws for our country. What does this mean unless there are great defects to be remedied? It simply results from the fact that the Common Law is so grossly inadequate to meet the demands of our own modern civilization that statute enactment is required to supply the deficiency. All the wise legislation that has been enacted in our country within the last one hundred and twenty-five years—for there has been much unwise legislation also—has been in the main a repeal of feudal rules and usages, and a return to the principles, sometimes even to the very letter, of the Roman Law. In other words, the contest between the Civil Law of Rome and the Common Law of Feudalism is yet going on to-day; that is, in the sense that, although the Civil Law has triumphed long ago in principle there remain numerous remnants of that law of Feudalism which require to be one by one eradicated.

Let me give you one or two illustrations, to show that this is not mere assertion without foundation in fact. Probably there is no more prominent feature in the legislation of the last half century than the restoration to married women of the power to control their own separate property independently of their husbands. It is simply the re-enactment of the provisions of the Civil Law of Rome, and a repudiation of the feudal theory of the legal merger of the wife's entity in that of her hus-

band. The provision is found in the Code of Justinian and in the Code Napoleon. It was the law of Republican Rome.

Again, the Common Law denied to parties litigant the right to testify on their own behalf. The rule of the Roman Civil Law, of the Code of Justinian, and of the Code Napoleon was directly the reverse. We have now everywhere in America restored the rule of the Civil Law. And all these are comparatively recent enactments. It is very plain that the contest is yet in progress.

Lord Bacon would have solved the difficulty in his day by the substitution, bodily and in its entirety, of the Civil Law for the Common Law of England; but the prejudices of Feudalism were too powerful to allow so radical a change. If it had been possible to overcome these prejudices, the change might have been made at that time without any serious disturbance of the social system or of the order of society. It was probably too late to make it at the time of our Revolution, even if it had been deemed advisable, since it might have caused great complications. The method adopted by our people was that of gradual elimination of the rules and usages of the Common Law; and under the circumstances it may have been the wisest.

It will be remembered that all our original thirteen colonies except Georgia, which was somewhat later than the others, but which is not an exception to them in the process of development, were planted during the reigns of

the Stuart kings and under charters emanating from those sovereigns. The colonists brought with them and established here the mingled system of Common Law and Equity which had prevailed in England before their departure from that country, and which had been firmly and finally confirmed, as already stated, by the decision of King James I. That system modified, improved and developed, as occasion required, has been perpetuated to this day, with the qualification, however, that Equity has been continually gaining upon the Common Law, and that, by means of statutory enactment, all the distinctive features of the Common Law have been eliminated from our jurisprudence.

It may be noted, however, that not all the founders of the colonies took kindly in the first instance to the establishment here of Courts of Chancery and the introduction of the Equity Jurisdiction. There was some hesitation on the subject in several of the colonies; but it finally became apparent in all of them that equity was as necessary as common law, and Courts of Chancery, as well as Courts of Common Law, were established everywhere. There was one remarkable exception. The amiable, but somewhat astute and prejudiced gentleman, who established the colony of Pennsylvania, was, like all the members of his creed at the time, very strongly opposed to everything that savored of ecclesiasticism. The Court of Chancery in England was of ecclesiastical origin; all its judges from the time of William the Conqueror to the

reign of Henry VIII, had been ecclesiastics. William Penn provided that there should be no Court of Chancery in Pennsylvania. The result was that the courts of common law, in a halting, imperfect, roundabout, and unsatisfactory way, administered the Equity Jurisprudence, under the guise, or rather disguise, of the Common Law as best they could, which was very poorly; and that, as soon as the proprietary government of the Penns came to an end by the outbreak of our Revolution, Courts of Equity were immediately established in Pennsylvania.

Equity and Common Law became concurrent parts of our American, as well as of the English Jurisprudence. It was concluded that the mongrel elements might coexist in peace. In America, as in England, separate courts were established for the administration of the two branches; and the separation continues to this day in several of our States—as, for example, New Jersey, Delaware, and Tennessee, which have Chancellors and Chancery Courts, distinct from those of the Common Law, to administer the special jurisprudence of Equity. But in most of our States there has long since been a blending of the two sets of tribunals, although in most instances without any attempt to blend the two systems of law, which, on account of their radical inconsistency, it seems to be impossible to do. And so we have the almost absurd spectacle frequently presented of the same tribunal rendering a judgment at Common Law at one moment, and immediately thereafter sitting as a Court

of Equity and enjoining the execution of such judgment or nullifying it by injunction. Of course, the absurdity does not consist in the administration of the two different branches of our Jurisprudence by one and the same tribunal, for that is right and proper enough, since judges and lawyers are now equally versed in the two systems as component parts of one composite law; but it consists in the incongruous existence side by side of two such discordant elements. The combination of the two elements in our Federal Jurisprudence became fixed by their recognition in the Amendments to the Federal Constitution.

But Common Law and Equity, the Common Law of England and the Civil Law of Rome, have not consented to maintain their respective conditions unchanged in our American Jurisprudence. That would be just as impossible as to blend the two. The situation established is that the transition from the Common Law of England to the Civil Law of Rome should be gradual and almost imperceptible, instead of being effected at one great bound; and the transition has been surely and unerringly going on ever since the establishment of our Colonies, but most rapidly and more thoroughly since the establishment of our National Independence. Ever since the Fourth of July of 1776, both in the States and in the General Government of the Union, in the latter, of course, somewhat more slowly on account of its limitations, the legislative power has been constantly at work to eliminate the Feudal Law and to substitute for it by statute the prin-

ciples of the Roman Law. One of the very first Acts of each and all the States was to repudiate the laws of inheritance as laid down in the Common Law of England, with all their feudal incidents, and to enact laws of inheritance in substantial accord with those of the Civil Law of Rome. The State of New York even went so far as to declare that all tenure of land should be regarded as allodial, as in the Roman Law, and not as feudal, as under the Common Law—although, in view of the adoption of the Roman Law of inheritance, the name signified but little when the substance had been satisfactorily attained.

The work of reform, of elimination and substitution, has gone on gradually but surely. Almost every salient feature of the Common Law of England has been banished from our social system and from our jurisprudence. We have abolished the rule of primogeniture. We have abolished the invidious distinction between males and females in the inheritance. We have abolished entails. We have discarded as far as practicable all the intricate incidents of feudal tenure—their name is legion, and they can not all be reached at once, and possibly some of them are innocuous. We have restored to woman the management of her own estate, and her right to contract for herself, which was secured to her by the Roman Law and denied by the Common Law of England. We have repudiated and utterly rejected the barbarous and inhuman penal branch of the Common Law, and have legis-

lated on the subject independently of the rigid demands of Feudalism and more in accord with the more reasonable regulations of the Code of Justinian. In brief, we have been solicitously and constantly engaged in undoing the work of the Common Law, which Coke and Blackstone declared to be the sum of human wisdom, and which the humanitarian now is almost ready to declare to have been the sum and consummation of human infamy.

Do not understand me as decrying the merits of our American law to-day, or indeed those of the Law of England, as it now exists in that country. On the contrary, notwithstanding some inferiority in principle to the Civil Law of Rome as that law has been embodied in the Code of Justinian and in the Code Napoleon, and notwithstanding some shortcomings which may hereafter be pointed out, the law of England and the United States, taken all in all, as administered to-day, is the best in the world. It is, after all, in the superiority of administration, rather than in intrinsic merit, that the excellence of any system is to be found. The best system of law badly administered is worse than the worst system well administered. Neither the Code of Justinian nor the Code of Napoleon, administered by despotic governments and corrupt magistrates can secure the welfare of a people as efficiently as the motley legacy of the so-called Common Law and Equity combined, which was left to posterity as the result of the contest between Coke and Bacon,

when that combined system is administered by courts of unblemished integrity for the benefit of a free people.

We have referred to the long contest between the Civil Law of Rome and the Common Law systems of the Teutonic barbarians as finally resulting in the complete triumph of the Civil Law everywhere, except in England and the United States. But we intimated also that the exception was possibly more apparent than real. From the development in both countries which has been noted, I think that it must be apparent that England and the United States are not, in fact, exceptions to the statement; and that the United States at all events should not be excluded from the list of countries that have adopted the doctrines of the Civil Law of Rome. It may be instructive to look for a moment at the work of Blackstone, and to see how much of the Common Law, as stated by that learned Commentator, is in existence in the United States to-day.

Blackstone's work, as you will remember, is divided into four books, of which the first treats of the organization of the state and the domestic relations; the second, of real and personal property; the third, of procedure in the administration of the law; and the fourth, of the subject of crimes and punishments. Of these, as every lawyer knows, the third is obsolete, and the fourth is almost wholly discarded. No one now ever thinks, except perhaps occasionally for illustration, to consult the third and four books of Blackstone for exposition of existing

law. With reference to the contents of the first book, one-half of it, the half relating to the organization of the English state, has absolutely no application whatever in the United States, and, as to the other half, that which deals with the domestic relations, the merger of the wife's legal entity in that of her husband, which is the cornerstone of the edifice of the Common Law in the matter of the relation of husband and wife, and therefore necessarily in the matter of all the domestic relations, we have utterly rejected. The domestic relations, as they existed under the Common Law, are not the domestic relations as they now exist in the United States.

The second book of Blackstone may be regarded as consisting of two parts, the first treating of real property, the second treating of personal property. The foundation of his law of real property is Feudalism. We have abolished it, root and branch, as far as we knew how; we have torn up the entire system. Our American law of real estate is not contained in the work of Blackstone; and it would be vain to look for it there. With reference to personal property, Feudalism had no law of personal property; nor has the Common Law of England. What you find in the second book of Blackstone on the subject—and it is excellent as far as it goes—was taken bodily from the Code of Justinian by the elder Commentator Bracton, already mentioned as having flourished in the reign of King Henry III of England.

Where then is our Common Law, or the Common Law

of England, whereof we often speak as existing among us? The expression is a misnomer. There is no such thing. The law of the United States to-day is not the Common Law of England, the Common Law of Coke or Blackstone, or anything remotely like it. It has greatly more of the Civil Law of Rome in it than it has of the Common Law of England. In fact, the proportion of the Common Law of Coke and Blackstone, which is retained in our system of jurisprudence, as compared to what we have taken from the Roman Civil Law, is infinitesimally small.

The more the subject is examined, the more certainly it will be found that only two salient features of the old Common Law of England are left to us. These are *trial by jury,* and *adherence to precedent;* and they belong not to the substantive, but to the adjective or administrative law. I would not deny the importance of either of them; but undoubtedly neither one now is held in the estimation in which it once was. Adherence to precedent is useful; but it no longer controls. It is no longer a ground for decision that a question involved has been decided in a certain way by another court or by the same court on a previous occasion. Precedent is persuasive, but no longer decisive—unless it has become a rule of property, or is the decision of a superior tribunal. It has been truly said, that in our country nothing is decided finally until it has been decided rightly; and the statement is as true of judicial, as it is of other questions.

The truth involved in the statement is fatal to the common law doctrine as to the force of precedents. A precedent is valuable only in so far as it states the truth, and not otherwise. We examine it not as a fact, but for its reasoning.

The system of trial by jury has been lauded as the bulwark of our liberties, and as the most admirable product of the Common Law; and it has been sought to show that it was indigenous in England and traceable back to Alfred the Great and to Anglo-Saxon times. The supposed Anglo-Saxon origin of the jury system has been completely disproved by Messrs. Pollock and Maitland in their excellent history of early English Law, who have distinctly traced it to the Franks, from whom it was borrowed by William the Conqueror or his immediate Norman successors for their own selfish purposes, and not with any view to the improvement of the law of England. There are those who find its real source in the system of *judices* selected by the praetor in the Roman Law for the determination of the facts in legal controversies when he himself had settled the law applicable thereto. But, however it originated, the system of trial by jury, which was not of much importance before the days of the Stuarts, or indeed before the latter part of the Eighteenth Century, when it first assumed the important part in the administration of justice which it yet retains, has become one of the most cherished features of our American Jurisprudence. In fact, notwithstanding that the institution existed in England at least as far

back as the reign of Richard I, it would seem as if its present function in the administration of the law had only been fully developed first in our colonial times in America. In the days of the Plantagenets and Tudors, and to a more limited extent in the time of the Stuarts and early Hanoverians, the jury was not the independent body which it is commonly supposed to have been; and it could not therefore have been the bulwark of liberty, or in any way instrumental in the promotion of human freedom. The jury was summoned by the sheriff according to his own will and pleasure from the freeholders or Norman landholders of each county; and the sheriff was the appointee from year to year of the sovereign. It is not quite apparent, therefore, how the jurymen could have been other than creatures of the royal pleasure, whenever the sovereign, or his ministers, or his favorites, thought proper for their own purposes to intervene in their selection. And, in fact, in the history of England, for 700 years from the Norman Conquest down to the reign of George III, the intelligent inquirer seeks in vain for any evidence of the development of human liberty through the instrumentality of the jury system. It is absurd in the extreme, therefore, to speak of the system of trial by jury as the bulwark of liberty. That the system served that purpose in the latter part of the Eighteenth, and during the early part of the Nineteenth Century may well be admitted; and it may be admitted that it is capable of serving that purpose now. Indeed, one

of the best evidences of its efficacy in that regard is the fact that, among the nations governed by the Code Napoleon, wherever constitutional institutions have been established, the system of trial by jury to a greater or less extent has also been introduced.

But whatever may be thought of the system of trial by jury in criminal cases—it seems that no better system has yet been devised or suggested—it is not at all certain that the administration of justice in civil cases by the instrumentality of juries conduces to the best results; and it must certainly be admitted, that if the system is to be made permanently useful, it must be radically amended. It has been radically amended in several of our States by the abolition of the requirement of unanimity, by some provision for proper qualification and intelligence, and by taking the selection away from the sheriff or placing restrictions upon his unqualified power of selection under the Common Law. Both in civil and criminal cases the standard of intelligence of the jury must be greatly raised, if the system is to be perpetuated.

In connection with the system of trial by jury there are two facts of great significance which should receive serious consideration. One is that it is difficult, and almost impossible in the cities of our country to get the best and most intelligent persons to serve upon juries,—a fact which forces the inquiry how far an institution can be perpetuated which the virtue and the intelligence of the people refuse to sustain by their participation in it.

There is another fact well known to every lawyer in good practice; it is, that one with a just cause always prefers to submit it for determination to a court without a jury rather than to a jury, while the speculative lawyer, whose cause may depend upon prejudice, always clamors for trial by jury. There is still another fact to be noted; and it is that the lawyer with a good cause very generally seeks, wherever the opportunity offers, to escape from a Court of Common Law and the uncertainties of a trial by jury, and to go to a Court of Equity for relief.

Probably there is no better illustration of the extent to which Equity, and therefore the Civil Law of Rome, has gained in our jurisprudence upon the Common Law than the statistics of the courts in respect of the number of suits therein filed. Where one hundred years ago the number of suits in equity filed as compared to those at common law was scarcely more than one to fifty in one year, and forty years ago was no more than one to ten, it is now in the proportion of one to two; and this too, in the face of the rule which yet remains the law as it was two hundred years ago, that recourse can be had to a Court of Equity only when there is no remedy, or no adequate remedy at Common Law. But, in fact, our civilization would be impossible without the advancing growth of our Equity Jurisprudence to meet its requirements.

The very existence of our system of Equity Jurisprudence is a confession of the utter inadequacy of the Com-

mon Law; and undoubtedly any system of law deserves to die which is compelled to confess its own inadequacy. The compromise effected in England between Common Law and Equity, and which we have inherited from the parent country, has served a useful purpose, and has, as we have seen, enabled the ultimate purpose of the substitution of the Roman for the Common Law to be effected quietly and gradually; but it could not prove entirely satisfactory when the demands of civilization became too rapidly pressing. The result has been in several of our States, in fact in a majority of them, to hasten the final consummation by the enactment of Codes—Codes of Law and Codes of Procedure—wherein, taking in all that was deemed expedient of existing law, their authors sought to emulate the Code of Justinian and the Code Napoleon by reducing the discordant mass to one simple, uniform, and consistent system. There are now such codes in a majority of the States of our Union. There has recently been one enacted by Congress for the District of Columbia. They are the final effort of our people to get away from the Common Law and to return to the rule of the Civil Law of Rome. The work of codification has not always been wisely done; there have not been many Tribonians engaged in it; and there have been no Justinians and no Napoleons to conduct and supervise their labors. But the purpose of their effort, which is that with which we are here mainly concerned, is unmistakable: it is to consummate as far as possible the en-

tire abolition of the Common Law of England, for which the only substitute which our civilization will permit is the Civil Law of Rome, with more or less modification.

In the Code systems of our States it has been sought even to do away with the forms of the Common Law; and in the place of their somewhat intricate refinements, which too often led to a miscarriage of justice, to substitute the pleadings of the Court of Equity—a simple petition and answer, in which the claims of both parties should be clearly stated, without the tedious technical formalities of the pleadings of the Common Law. The innovation has led to some looseness of statement, and has almost destroyed the race of good pleaders; but it is not apparent that it has detracted from the attainment of the substantial ends of justice.

Perhaps this would be the proper place to notice an objection that has often been taken to the Civil Law of Rome by bigoted adherents of the English Common Law without much knowledge of what they speak. In the Code of Justinian there is found as a maxim or a rule of law the statement—"*Quicquid principi placet legis vigorem habet*"—which, literally translated means—"*Whatever pleases the prince (or chief of the state) has the force of law.*" And this if often cited as an evidence of the despotic tendencies of the Civil Law of Rome and its unsuitableness for a free people.

Of course, if we are to consider the Common Law of Feudalism as a "system of freedom," such as Black-

stone with unblushing mendacity pronounced it, then freedom is something very different from what we in America understand it to be, and from what Rome and Greece, and Judea understood it to be. Only the soldier and the savage are freemen, and communities governed by law alone are not such; and the Civil Law of Rome, although elaborated and established by the men of Republican Rome, ardently attached to the principles of liberty, is only fit for slaves. But the objection is not well founded, and the objection to the rule or maxim is at the utmost based on a misapprehension.

The word "principi" is not intended merely to designate the Emperor or chief of the state; but is the equivalent of the expression "the supreme power in the State," used by Blackstone in his famous definition of law, when he said that it was "a rule of conduct prescribed by the supreme power in the State, commanding that which is right ,and prohibiting that which is wrong." The statement, as is very clear from its context in the Code, was not intended by Tribonian and his associates, or by the Emperor Justinian himself, either as an assertion of absolute power in the monarch or as a justification of its existence. In fact, the statement was meant as a definition of law, and does not greatly differ in meaning from Blackstone's definition.

Even if it were intended in the sense given to it by the objectors to the Roman Law, there is the plain answer that in that sense it is no substantial part of the Civil

Law of Rome, but at the most an imperial addition to the Republican edifice. And we may well contrast with it the infamous rule of the Common Law of England, that "the king can do no wrong," a maxim which will justify any tyranny on the part of the sovereign, and which is greatly more objectionable in every aspect than the rule of Justinian.

In the history of law there remains to be mentioned one other development, for which free America is to be credited, and which in some respects is the greatest step in advance that has ever been taken. I refer to the recognition of the triple nature of the powers of a government and the establishment of an independent judiciary.

Montesquieu, the famous French publicist, is recognized as the first person to have suggested the propriety of this division of governmental authority, and to have found the germs of it in the so-called English Constitution. In his great work on "The Spirit of the Laws"—"*L'Esprit des Lois*"—published in 1748, he said:

"In every government there are three sorts of power: The legislative; the executive, in respect to things dependent on the law of nations; and the executive, in regard to things that depend on the civil law. * * * * The latter we shall call the judiciary power, and the other simply the executive power of the State." (Esprit des Lois, Book XI, Chap. 6, paragraphs 1, 2.)

And he intimates, although he does not say so in so many words, that this division is to be found best devel-

oped in what he calls the British Constitution. It was there practically, although not in theory. England's practice has often been better than England's theory. Theoretically, even down to the present day, the English sovereign is absolute. He is the source of all power. The parliament is his parliament; the courts are his courts. The judges are his deputies, holding their offices subject to his will. The parliament is his council over whose acts he holds the power of absolute veto. In old times the statutes were not acts of parliament, but acts of the king in parliament, or enacted at the request of the parliament. After the Revolution of 1688 all this was changed in practice. The parliament gradually became the real legislative power, whose acts the king would not dare to veto except at the risk of his crown, although he has the theoretical authority so to do. And a series of able judges, both in the courts of Common Law and those of Equity, among whom Lord Hardwicke and Mansfield stand out prominent and pre-eminent, have administered justice with so fearless a degree of independence as to give the world the idea of the existence of a larger share of constitutional freedom than really existed. Of course, later developments have all tended to increase the independence of the English Judiciary.

But it remained for our own America to develop the idea of the triple division of the powers of government and their true relation to each other to the fullest extent. The germ,which Montesquieu thought he found in

England, he would have found more maturely developed even then in our colonies, if he had been better acquainted with them. By reason of their peculiar circumstances the triple division had become the almost universal practice of the thirteen colonies; and what was practice in the colonies became fundamental law when the colonies became independent states. Immediately upon the Declaration of Independence, indeed a month before that great document was promulgated, the first formal enunciation of the principle was made in June of 1776, in the first Constitution adopted by the State of Virginia, which was the first of all our State constitutions. There, in the very first clause of that fundamental ordinance it was stated that "the legislative, executive and judiciary departments of the State shall be separate and distinct, so that neither exercise the powers properly belonging to the other." And the principle so enunciated was promptly adopted by all the other States, and finally fashioned our Federal Constitution. The principle has become fundamental law in America. It has now to a greater or less extent permeated the policy of all civilized nations; although nowhere has it been so thoroughly established as a part of governmental polity as it has been with ourselves. Possibly it might not be difficult to trace the source of the theory back to the Roman Republic, which had the Comitia Centuriata and a Senate to make laws, Consuls to execute and enforce them, and Praetors to administer them in the daily transactions of the people.

And possibly it would be possible to trace it still farther back—to the Republican Commonwealth of Athens, which had its Assembly of the People to make laws, the Archons to carry them into effect, and the High Court of the Areopagus, the most wonderful governmental institution of the ancient world, to administer justice. But wherever the original germ is to be found, it is the glory of the founders of our American institutions to have been the first to announce the principle distinctly as a cardinal rule of government and the first to give it practical and substantial effect. We are a wonderfully inventive people; but the greatest of American inventions is that of an independent judiciary, constituting an equal co-ordinate power in the State with the legislative and executive branches of government. An independent judiciary is the best safeguard of popular liberty that has ever been devised, and the best contribution to jurisprudence that has been made in modern times. It fitly marks the consummation in our own Republic of the best efforts of three other famous republics: Rome, Athens, and Judea, in the science of Jurisprudence.

To Rome, Athens and Israel we owe all that is best in our institutions. It is they that have developed our law for us. To the barbarians from whom we are descended we owe nothing but our descent. We do not owe them even the spirit of liberty with which they have often most erroneously been credited. Their liberty was lawlessness; it was the liberty of the nomad, the wild Indian and

the Arab. True liberty is law; or, as it has otherwise been stated, it is freedom regulated by law. The barbarians sought to perpetuate their lawlessness and to strangle Civilization by the institution of the Feudal System; but Civilization was saved by the incessant efforts of Christianity and the Roman Law. To Christianity and the Roman Law we, the descendants of the barbarians, are indebted for the blessings of freedom and for the happy failure of our ancestors to arrest indefinitely the Development of Law.

In bringing this subject to a close, the attention of my readers is directed to the fact, which in a general way must have been apparent to them, that there is a certain continuity in the stream of jurisprudence which has flowed down to us from the earliest ages. First developed on the banks of the Euphrates and the Nile and by the shores of Tyre and Sidon, with perhaps some contribution from the far off region of our Aryan brethren on the banks of the Indus, the science of Jurisprudence received its highest development in the Codes of the three Republics of Israel, Athens and Rome, from all of which we borrowed something for our own institutions. Our indebtedness to Rome in the domain of law is especially great. The activity of Rome and Athens in the matter of legislation we are now repeating. If we can profit by the experience of those nations, it will not be in vain that we have devoted some little of our time to the History of the Development of the Law.

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